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IN THE

Supreme Court of the United States

October Term, 1957

No. 587

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC.,

Petitioners,

—against—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, appellants below, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on October 3, 1957.

Opinions Below

The opinions of the Court of Appeals for the District of Columbia Circuit (J.A. 141-150, 164-181) are not yet reported. They are reproduced in appendices I and II, *infra*, pp. 41-72. The opinion of the United States District Court for the District of Columbia (J.A. 117-134) is re-

ported at 128 F. Supp. 564 (1955). It is also reproduced in Appendix III, *infra*, pp. 73-94.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on October 3, 1957 (J.A. 182). On October 18, 1957 that Court granted a stay of its mandate pursuant to Rule 31(k)(2) of its Rules pending an application to the United States Supreme Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does a federal obscenity statute with criminal sanctions, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, authorize the postmaster general to exercise censorial powers of prior restraint over periodical publications by withholding them from dispatch through the mails pending a determination of the issue of obscenity?

2. Did the hearing examiner of the Post Office Department and the District Court for the District of Columbia, whose judgment was affirmed by the Court of Appeals for the District of Columbia Circuit, in failing to consider the publications in the instant case as a whole apply a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957)?

3. Did the District Court for the District of Columbia, whose judgment was affirmed by the Court of Appeals for the District of Columbia Circuit, in finding certain pictures to be obscene because they were "grotesque" and "vile"

apply a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957)?

4. Did the Court of Appeals for the District of Columbia Circuit in judging the publications in this case rather than the conduct and intent of the petitioners decide a federal question in a way in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957)?

5. Did the purported hearing before the hearing examiner of the Post Office Department, in which all evidence was excluded save the challenged publications, comply with due process?

Constitutional and Statutory Provisions Involved

1. Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183:

> **"Mailing obscene or crime-inciting matter**
>
> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance
>
> . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof,

or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

*** * * * * *"**

Statement of the Case

The petitioner, Sunshine Book Company, is a non-profit New Jersey corporation which publishes a monthly periodical, *Sunshine & Health*. This periodical advocates the cause of nudism and in the course of its advocacy has carried articles on this and a wide range of related social and educational questions by psychiatrists, psychologists, social workers, doctors and ministers (J.A. 21-22).

The petitioner, Solar Union Naturisme, Inc., is another non-profit New Jersey corporation. It publishes a bimonthly periodical, *Sun Magazine*, which is its official publication. This petitioner is an international, interlingual interracial association representing the nudist movement all over the world and on all levels of organization—individual, group, regional, national and international. *Sun Magazine* is the same type of periodical as *Sunshine & Health* except that its emphasis is on the international aspects of the nudist movement (J.A. 22-23).

Sunshine & Health and *Sun Magazine* have had and have a wide circulation locally, nationally and abroad. They have been and are being distributed to the 48 states through the United States mails. *Sunshine & Health* has now been published and distributed continuously for more than a quarter of a century. *Sun Magazine* is now in its sixth year of publication. At no time during this period of more than a quarter of a century have any of the publishers of these

two periodicals been indicted or otherwise criminally charged with or convicted for their publication, distribution or receipt through the United States mails under any of the federal criminal statutes governing the circulation, distribution, or receipt through the United States mails of obscene, lewd, lascivious or fraudulent matter (J.A. 24).

The managing editor of both periodicals is Dr. Ilsley Boone, and the editor of both is his daughter Mrs. Margaret A. B. Pulis (App. II, p. 65) (J.A. 49, 62, *Summerfield* v. *Sunshine Book Co.*, Oct. Term 1954, No. 665). Dr. Boone is a Baptist minister, a Master of Sacred Theology, and the dean of American nudists. He is a 78 year old great grandfather, whose children, grandchildren and great grandchildren are all nudists (J.A. 49, 56, *Summerfield* v. *Sunshine Book Co.*, Oct. Term 1954, No. 665).

Dr. Boone believes that human beings will be healthier physically and mentally if they practice nudism; that the practice of nudism will satisfy the healthy curiosity of children and eliminate the unhealthy curiosity of adults about the human body. He has visited most of the nudist camps in the United States and many of those in Europe. He has worked with and observed nudists by the thousands at work and at play for more than a quarter of a century. On the basis of his experience he states that the practice of nudism does not lead to sexual delinquency or lasciviousness in any form (*Id.* at 56-57).

Pictures illustrate the text of these two periodicals. These pictures were taken in nudist camps (*Id.* at 62). They show nudists in the enjoyment of thoroughly innocent activity. They contain nothing suggestive or pornographic. Some of them are not without artistic merit and

all of them present individuals in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth (J.A. 23-24).

Because of the pictures Dr. Boone has been in a series of long controversies with the Post Office Department, of which this is the third. The first proceeding involved the mailability of the May 1948 issue of *Sunshine & Health*, and began in April of that year. Subsequently this proceeding was enlarged to include the July, August, September and October 1948 issues. This proceeding continued from time to time before an examiner of the Post Office Department until it was dismissed on May 10, 1951, more than three years after its inception. The order dismissing this proceeding was entered at the request of the associate solicitor of the Post Office Department (J.A. 19).

In this and in a related proceeding petitioner, Sunshine Book Company, was permitted to offer testimony on community standards and on the effect of its publication upon readers. Its witnesses included Dr. J. G. N. Cushing, Dr. Ralph Banay, and Dr. Frederic Wertham, an eminent psychiatrist (J.A. 58).

In the discussions which led to the dismissal of the first proceeding on May 10, 1951, counsel for the petitioner, Sunshine Book Company, thought he had an understanding with the then Solicitor of the Post Office Department to the effect that, if there should be any future proceedings in the Post Office Department involving the mailability of issues of *Sunshine & Health* or similar publications, either of the parties could use the testimony of the experts who testified in the first proceeding (J.A. 58). In this proceeding the representatives of the Post Office Department denied that there was any such agreement (J.A. 54).

The second proceeding began in September 1952, when the then Solicitor for the Post Office Department, allegedly pursuant to 39 U. S. C. §259(a), 64 Stat. 451, sought to stop all mail addressed to the petitioners on the ground that the publications *Sunshine & Health* and *Sun Magazine* were obscene (J.A. 24-25). Petitioners filed answers to the complaint and a hearing was conducted before a hearing examiner of the Post Office Department in February 1953 (J.A. 25).

At the hearing petitioners stipulated to the introduction in evidence of 25 issues of *Sunshine & Health* from the March 1951 issue to and including the March 1953 issue, and seven issues of *Sun Magazine* beginning with the January-February 1952 issue and ending with the March-April 1953 issue (J.A. 25-26). Apart from the publications themselves, which were admitted in evidence by stipulation, the Post Office Department offered no evidence to support its complaint.

At that hearing the petitioners sought to produce expert testimony to the effect that the advocacy of nudism by text and illustration as in the challenged publications did not violate community standards and also as to the effect of these publications upon readers. The hearing examiner denied this offer of expert testimony (J.A. 14-15, 26).

In March 1953 the hearing examiner made his initial decision. He came to the conclusion that while the written materials in the challenged publications were not obscene, some of the photographs were objectionable within the meaning of 39 U. S. C. §259(a), 64 Stat. 451, and that accordingly the petitioners were in violation of that section as charged in the complaint. He recommended an order

by the Postmaster General for the denial to the petitioners of any mail communications or transmittals (J.A. 26-27).

Pursuant to the applicable rules and regulations of the Post Office Department for proceedings under 39 U. S. C. §259(a), 64 Stat. 451, the petitioners duly appealed from the determination by the hearing examiner to the Postmaster General. In June 1953 the Postmaster General by decision and orders concurred in the finding and recommendation of the hearing examiner (J.A. 27).

Thereupon the petitioners sought declaratory and injunctive relief in the United States District Court for the District of Columbia. After a full hearing federal District Judge Henry A. Schweinhaut found and held that the publications were not obscene, that they did not fall within 39 U. S. C. §259(a), 64 Stat. 451, and that the orders of the Postmaster General were invalid *Summerfield* v. *Sunshine Book Company*, D. D. C. Civ. Action No. 3007/53, July 13, 1953.

The Court of Appeals for the District of Columbia Circuit affirmed Judge Schweinhaut's decision on the ground that the Postmaster General's orders were "too broad". *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, 48 (Dec. 16, 1954). In the course of its opinion the Court of Appeals described the publications as "nudist magazines which advocate and explain nudism and the nudist mode of living" (at 43), and stated that they had "a substantial and admittedly innocuous text". At 45. This Court denied certiorari. 349 U. S. 921 (May 9, 1955).

The decision of the Court of Appeals for the District of Columbia Circuit in the second proceeding was on December 16, 1954. The first issues of *Sunshine & Health* and

Sun Magazine following this decision were the February 1955 issue of *Sunshine & Health* and the January-February 1955 issue of *Sun Magazine*. The Postmaster General now sought to withhold these publications from dispatch through the mails under 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183. Thus began this proceeding.

It began in the last week of December 1954. Just prior thereto the petitioner, Sunshine Book Co., had completed the printing of approximately 40,000 copies of the February 1955 issue of *Sunshine & Health*, of which 10,000 copies were to be circulated through the mails (App. I, p. 44). In that week the petitioner, Sunshine Book Company deposited 400 copies of this issue with the local postmaster at Mays Landing, New Jersey for mailing as third-class matter pursuant to 39 U. S. C. §235, 50 Stat. 119 (J.A. 31). On December 29, 1954 the local postmaster at Mays Landing, New Jersey sent to the Solicitor of the Post Office Department a copy of the February 1955 issue of *Sunshine & Health* from the 400 copies of that issue deposited with him (J.A. 41, 74). On the next day, December 30, 1954, the Solicitor instructed the local postmaster that:

> "... the February, 1955, issue, should be withheld from dispatch and the senders should be notified by registered mail of this action. They should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at this office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit." (J.A. 74)

In careful compliance with this instruction, the local postmaster under letter dated December 31, 1954, advised the publisher of *Sunshine & Health*:

> "I have been requested by the Solicitor of the Post Office Department to inform you that the February, 1955 issue of 'Sunshine and Health' is nonmailable and must be withheld from dispatch.
>
> "You may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at the office of the Solicitor, Post Office Department, Washington, D. C. in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments you care to submit. . . ." (J.A. 40, 75)

Promptly thereafter, and on Monday and Tuesday, January 3 and 4, 1955, the petitioner, Sunshine Book Company prepared its original complaint, motion for a temporary restraining order, and motion for a preliminary and permanent injunction (See J.A. 3, 8, 12). Prior to the filing of these papers and on Wednesday, January 5, 1955 Dr. Boone and his attorney had a conference with representatives of the Post Office Department in Washington in order to attempt to persuade them that the Postmaster General should recede from the position which he had taken with reference to the February 1955 issue of *Sunshine & Health*, at least until after the Post Office Department had made up its mind what to do about the decision of the Court of Appeals for the District of Columbia Circuit of December 16, 1955 in the second proceeding (J.A. 14). Representatives of the Post Office Department stated that they would give consideration to counsel's argument.

On Thursday, January 6, 1955, under the lure held out by representatives of the Post Office Department that they were still giving consideration to counsel's argument, Dr. Boone and his attorney again met with these representatives. At that time they asked counsel whether he wished a hearing on mailability of the February 1955 issue of *Sunshine & Health*. Counsel responded that he did not wish one of the Post Office Department's so-called hearings. A representative of the Post Office Department then stated that counsel was rejecting a hearing. Counsel again responded in the negative. He emphasized that he was neither rejecting nor requesting one of these so-called hearings. At this point the assistant solicitor for the Post Office Department served upon Dr. Boone and his attorney a notice of hearing for January 10, 1955 before a designated trial examiner (J.A. 14):

> ". . . to determine the mailability of the February 1955 issue of Sunshine and Health magazine, copies whereof are now being withheld from dispatch by the Postmaster at Mays Landing, New Jersey, pursuant to instructions issued to him by the Solicitor for the Post Office Department, copy attached. The postmaster's letter to you dated December 31, 1954, copy also attached, advises you of the availability of a hearing but erroneously states that the Solicitor had already made a determination of nonmailability with respect to the magazine, no ruling or determination either of mailability or nonmailability having yet been made by the Solicitor or by any person authorized to do so by or in behalf of the Post Office Department. The Chief Hearing Examiner's initial decision and recommendation will be subject to appeal to the Solicitor for the Post Office Department to whom the Postmaster General

has delegated the authority to make a final decision for the Department." (J.A. 16, 41, 73-74).

On the same date, January 6, 1955, the assistant solicitor served upon the petitioner, Solaire Union Naturisme, Inc., a notice of hearing to be held on January 11, 1955

> ". . . to determine the mailability of the January-February, 1955 issue of the publication entitled Solaire Universelle Nudisme Magazine, under the provisions of Title 18 United States Code, Section 1461.
>
> "Please also be advised that the undersigned will request a ruling by the Postmaster General or by the Solicitor pursuant to his duly delegated authority, declaring the aforesaid magazine to be obscene, lewd, lascivious and indecent and, therefore, nonmailable matter, which shall not be conveyed in the mails or delivered from any post office nor by any letter carrier under the provisions of said Title 18 United States Code, Section 1461." (J.A. 42)

On the same day, January 6, 1955, the petitioner, Sunshine Book Company, filed its complaint and motion (J.A. 2-13). On January 7, 1955 federal District Judge James R. Kirkland denied the requested temporary restraining order (J.A. 17, 105-106, 118), and set the hearing on petitioners' motion for a preliminary injunction for Monday, January 17, 1955.

There then began discussions between counsel for petitioners and representatives of the Post Office Department as to which should come first: the court hearing on the motion for a preliminary injunction or the purported hearing before the hearing examiner of the Post Office Department. These discussions were complicated by the fact that

January 15 and 16, 1955 were a Saturday and Sunday and counsel for petitioners, who resided in New York, wanted both the court hearing and the administrative hearing to take place during the course of a single week. He finally yielded priority of hearing to the representatives of the Post Office Department and agreed that the administrative hearing before the hearing examiner would be held on Monday, January 17, 1955 and the court hearing on petitioners' motion for preliminary injunction on Tuesday, January 18, 1955 (See J.A. 18, 43). This was the request by petitioners for additional time to which Circuit Judge Fahy referred in his concurring opinion of October 3, 1957 (App. I, p. 54).

On January 17, 1955 an administrative hearing took place before a hearing examiner of the Post Office Department on the question of the mailability of the February issue of *Sunshine & Health* and the January-February 1955 issue of *Sun Magazine* (J.A. 76). The hearing examiner stated near the outset that since the hearing involved mailability it was "governed by no published rules of practice or procedure that I am aware of" (J.A. 78). In this respect it was to be "distinguished from a proceeding under 39 U. S. C. §259(a) or a proceeding under the postal fraud of the statutes" (J.A. 78).

During the course of the hearing he stated "that this proceeding is being conducted without the benefit of any published rules of practice or procedure" (J.A. 80). He further twice stated, referring to the proceedings before him:

> "* * * this proceeding is not being conducted within the framework of the APA. * * *

> "* * * nor is it one of those cases in which our own rules of practice specifically brings it within the purvuew [sic] of an APA case wherein adjudication is required to be made upon the record after a hearing." (J.A. 82)

At that proceeding the Post Office Department offered no evidence other than the challenged issues of the magazines. Petitioners urged that the publications were not obscene, that the issue of obscenity had already once been determined and that the action to bar the publications from the mails was in excess of statutory and constitutional authority.

Petitioners further offered evidence concerning community standards and on the effect on readers of the publications in question. Petitioners offered portions of the testimony of Dr. Ralph Banay, Dr. J. E. N. Cushing and Dr. Frederic Wertham from the first proceeding (J.A. 93-94). The hearing examiner sustained an objection (J.A. 95). Petitioners offered the uncontested affidavits of Dr. Boone, his daughter, Margaret A. B. Pulis, Dr. Albert Ellis, a psychologist, Mr. Eugene V. Thau, an art historian, and the Reverend Charles Francis Potter from the second proceeding (J.A. 83) (J.A. 41-66, *Summerfield* v. *Sunshine Book Company*, Oct. 1957, No. 665). The hearing examiner rejected them (J.A. 95-96).

On January 18, 1955 the petitioners filed their amended complaint, which was substantially the same as the original complaint except that it included the matters of fact and law which arose as a consequence of the barring from the mails of the January-February 1955 issue of *Sun Magazine*. On the same day Judge Kirkland heard argu-

ment on petitioners' motion for a preliminary injunction. He denied it and set the cause down for trial for January 31, 1955 (J.A. 43).

On January 20, 1955 the hearing examiner filed his decision and recommendation (J.A. 61). He found the issues in question to be obscene and recommended that they be declared nonmailable (J.A. 69). At the same time he notified the petitioners that an appeal to the Solicitor was available to them but that it had to be filed not later than January 25, 1955 (J.A. 60). The petitioners filed their notice of appeal on January 24, 1955 (J.A. 55). At the same time they made a motion for leave to submit evidence on community standards (J.A. 57-59). The attorney for the Post Office Department opposed this motion (J.A. 53). The only response to this motion was the concurrence of the Solicitor in the decision and recommendation of the hearing examiner and his instruction to the local postmaster at Mays Landing, New Jersey to treat the February 1955 issue of *Sunshine & Health* and the January-February issue of *Sun Magazine* as nonmailable (J.A. 44-45). The Solicitor's ruling reached counsel for petitioners at 10:00 P.M. Sunday evening, January 30, 1955 (J.A. 100, 110).

On the next day, January 31, 1955, the court case came on for hearing before Judge Kirkland (J.A. 97). Near the outset Judge Kirkland declared that he had been over the reading material in the publications in question "carefully" and had found nothing in the text that was obscene (J.A. 108). Petitioners again offered expert testimony on community standards and on the effect of petitioners' periodicals upon readers. Judge Kirkland ruled that such evidence was not relevant (J.A. 108-115).

At the conclusion of the hearing and on the same day Judge Kirkland announced his decision from the bench, ruling against petitioners (J.A. 117-135). Although he concluded that the whole of the text was unobjectionable (128 F. Supp. at 569, J.A. 126, App. III, p. 84), he found five photographs in each of the publications to be obscene (128 F. Supp. at 571-573, J.A. 129-133, App. III, pp. 88-92). The space which the proscribed photographs occupy is approximately 3% of the issue of *Sunshine & Health* and 2% of the issue of *Sun Magazine*.

As to two of the five proscribed photographs in the issue of *Sunshine & Health* the Court found them to be obscene because they were "grotesque" and "vile", and one because it was "filthy" (128 F. Supp. at 571-572, J.A. 130-131, App. III, 88-90). One of the proscribed pictures in *Sun Magazine* the Court found to be obscene because of its "vulgarity" (128 F. Supp. at 572, J.A. 132, App. III, p. 91). On the basis of these five photographs in each of the two issues in question Judge Kirkland concluded that the dominant theme of both magazines was "clearly one of obscenity" (128 F. Supp. at 573, J.A. 134, App. III, p. 93).

On February 16, 1955 Judge Kirkland filed findings of fact and conclusions of law and entered a judgment dismissing the amended complaint with prejudice (J.A. 135-139). One of his findings of fact was that the text of the magazines was not obscene (J.A. 137).

On May 31, 1956 the Court of Appeals for the District of Columbia Circuit handed down a 2-1 decision reversing the judgment of the district court on the ground that the Postmaster General's action constituted a prior restraint

not warranted by 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183. Circuit Judge Washington wrote the opinion of the court in which Chief Judge Edgerton concurred. Circuit Judge Danaher dissented (App. II, pp. 68-72).

The respondent requested a rehearing *en banc* which the court ordered (J.A. 167, App. I, p. 44). The rehearing took place on September 25, 1956. On October 3, 1957 the court rendered a 5-3 decision affirming the judgment of the District Court. Circuit Judge Danaher wrote the majority opinion and Circuit Judge Washington the dissenting one (J.A. 164-181, App. I, pp. 41-60). The court's judgment was entered on the same day (J.A. 182, App. I, p. 61). On October 18, 1957 the court granted a stay of its mandate pending an application to this Court for a writ of certiorari.

The opinion of May 31, 1956 of the Court of Appeals for the District of Columbia Circuit contained this paragraph:

> "In the instant case, the magazines 'advocate and explain nudism and the nudist mode of living.' *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. at 170, 221 F. 2d at 43. Their texts were found by the Post Office Department and the District Court not to be obscene. But both the Department and the District Court thereupon proceeded to deal with the illustrations in the magazines merely as such. The Examiner of the Post Office Department and the District Court explicitly recognize in their opinions that the publications must be considered as a whole. Yet an examination of their opinions, as well as that of the Solicitor of the Post Office Department, shows no

effort to weigh the material considered objectionable against the rest of the contents, or to weigh the risk in permitting the former to circulate against the limitations on freedom of the press implicit in halting circulation of the latter. Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. *Parmelee* v. *United States, supra,* 72 App. D. C. at 209, 113 F. 2d at 735; *United States* v. *One Book Entitled Ulysses, supra,* 72 F. 2d at 707, 708. 'Honest, sincere' works must be distinguished from publications 'wholly for the purpose of profitably pandering to the lewd and lascivious.' *Parmelee* v. *United States, supra,* 72 App. D. C. at 209, 210, 113 F. 2d. at 735, 736. If the matter of intent had been considered, substantial evidence of sincerity of motive, and lack of 'profitable pandering' was contained in uncontroverted affidavits by the managing editor of the magazines in question, who is an ordained Baptist minister, and by the editor of the magazines, his daughter." (J.A. 143-144, App. II, pp. 64-65).

Approximately 25% of the total circulation of *Sunshine & Health* and 30% of the total circulation of *Sun Magazine* was to be distributed through the mails (J.A. 167, App. I, p. 44, J.A. 30, 33). In this connection petitioners alleged in their amended complaint:

> "Thirty-fifth: In the United States today the life of dated periodical publications depends on their prompt dissemination through the United States mails and the Post Office Department has long recognized the importance of the use of the mails for the prompt circulation of periodical publications.
>
> "Thirty-sixth: In the United States today the life of periodical publications depends on their prompt

circulation through the United States mails, and for two reasons: In the first place the dissemination through the United States mails must be prompt, for any delay in distribution of a dated periodical publication means the death of this issue; in the second place periodical publications depend for their continued existence on dissemination through the United States mails for they receive a larger percentage of return on copies so disseminated to subscribers than on the copies distributed by other means such as those distributed by means of newsstands." (J.A. 33-34)

Reasons for Granting the Writ

I

The Court of Appeals for the District of Columbia Circuit, in holding that a federal obscenity statute with criminal sanctions, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, authorized the Postmaster General to exercise censorial powers of prior restraint over periodical publications by withholding them from dispatch through the mails pending a determination of obscenity, decided an important question of federal law which has not been, but should be, settled by this Court.

A.

In *Roth* v. *United States*, 354 U. S. 476 (1957) The Court Did Not Reach The Question Whether 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, was more Than A Penal Statute.

In *Roth* v. *United States*, 354 U.S. 476 (1957), the Court sustained the constitutionality of 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, in a criminal prosecution. However, the Court did not reach the question whether this statute was more than penal in nature. It did not reach

the question whether this statute also conferred upon the Postmaster General censorial powers of prior restraint over periodical publications by withholding them from dispatch through the mails pending a determination of the issue of obscenity. That question is presented in this case. It is an important question of federal law. It has not been but should be settled by this Court.

The differences in procedure between a criminal prosecution and an administrative hearing are vital. In a criminal proceeding one is entitled as of right to a jury trial. In an administrative hearing there is no jury. If one is constitutionally entitled to a jury trial on the issue of obscenity, then 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, cannot be construed as other or more than a criminal statute. In the *Roth* case the Court did not reach this question. As Mr. Justice Brennan, who wrote the Court's opinion, pointed out in his dissenting opinion in *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957), the instant obscenity statute as applied in the *Roth* case "allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity." 354 U. S. at 448. That important question is presented here. It should be settled by this Court.

B.

The Instant Federal Obscenity Statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, Always Has Been And Still Is Nothing Other Or More Than A Criminal Statute.

The instant federal obscenity statute began as a criminal statute and it is still one. It was part of the Criminal

Code of 1909. 35 Stat. 1129. It is part of the Criminal Code today.

The first predecessor of 18 U. S. C. §1461, 61 Stat. 768, 69 Stat. 183, was §16 of an Act of March 3, 1865. 13 Stat. 507. This section provided:

> ". . . no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivering, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor, and, being duly convicted thereof, shall for every such offence be fined, not more than five hundred dollars, or imprisoned not more than one year, or both, according to the circumstances and aggravations of the offence."

The Senate debates on this measure make it plain that it was intended to be only a criminal statute. As reported in the Senate the measure originally contained this additional provision:

> ". . . all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct." *Cong. Globe*, 38 Cong., 2d Sess. 661 (1865).

Senator Jacob Collamer of Vermont in reporting the proposed measure had misgivings about this clause because it would give the Postmaster General "a sort of censorship over the mails." *Ibid.* Senator Reverdy Johnson of

Maryland moved to strike it on the ground "that it would be establishing a very bad precedent to give authority to postmasters to take anything out of the mail." *Ibid.* The Clause was stricken.

There is nothing to show that in any of the subsequent revisions of this measure Congress intended to give the Postmaster General the censorial powers specifically denied to him in 1865.

On the contrary in 1915 a bill was introduced, 63d Cong., 3d Sess., H.R. 20,644, to give the Postmaster General power to deny the use of the mails to one who in the opinion of the Postmaster General was engaged in the publication of obscene material. It was objected that this "bill would invest one man * * * with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular Court practice. * * * Trial by jury and a penalty inflicted for each specified act is the only safeguard against an arbitrary and tyrannical power." *Hearings Before House Committee On The Postoffice and Postroads, Exclusion Of Certain Publications From The Mails,* 63d Cong., 3d Sess. 38-39 (February 1, 1915). The bill failed of passage. Justice Brandeis related this incident in his dissenting opinion in *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U. S. 407, 424 n. 7 (1921):

What this Court said of one of the predecessors of 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, in *Ex parte Jackson,* 96 U. S. 727 (1878), still holds true today. In that case this Court said:

> "All that Congress meant by this Act was, that the mail should not be used to transport such corrupt-

ing publications and articles, and that anyone who attempted to use it for that purpose should be punished." At 736.

That statement is still valid about the present obscenity statute.

But the Court of Appeals for the District of Columbia Circuit in its opinion of October 3, 1957, pointed to the declaration of nonmailability (J.A. 169-170, App. I, p. 47). This declaration and the further provision that obscene material was not to be "delivered from any post-office nor by any letter-carrier" was first added to this obscenity measure by an Act of July 12, 1876, 19 Stat. 90; and there was no discussion on the point. It is to be doubted whether Congress intended by these additions to give the Postmaster General powers of prior restraint specifically denied to him scarcely more than a decade before. It may be suggested that the exclusionary words introduced into this obscenity measure by the Act of 1876 were only intended to authorize the Post Office Department to refuse delivery of publications previously found to be obscene as a result of a criminal proceeding in which there was a right to a jury trial. Such a construction of this obscenity measure would entail no system of administrative prior restraint, for obscenity judgments would rest exclusively with juries summoned in criminal proceedings and the Post Office Department would merely carry these prior jury judgments over into its administration of the postal service.

By way of contrast to 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, one can refer to 18 U. S. C. §1463, 62 Stat. 769, with reference to obscene matter on wrappers or envelopes, which contains the added provision that such materials "shall be withdrawn from the mails under such

regulations as the Postmaster General shall prescribe." There is no such or comparable provision in the instant statute.

C.

Censorial Powers Of Prior Restraint Should Be Denied In The Absence Of An Express Congressional Grant.

In *Hannegan* v. *Esquire*, 327 U. S. 146 (1946), this Court pointed out that Congress had always "zealously watched and strictly confined" any proposal to empower the Postmaster General to refuse to carry mail because of its content. At 156 n. 18. This Court has taken the same approach, as *Hannegan* v. *Esquire, supra*, and other cases demonstrate. In *Hannegan* v. *Esquire, supra*, the Court held that the Postmaster General did not have power to deprive *Esquire* Magazine of second-class mailing rates because he doubted the worth of the magazine's contents. The Court said:

> ". . . To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred." At 151.

In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902), the Court gave a restrictive construction of the mail fraud statute in order to preclude the Postmaster General from exercising power over the use of the mails upon the basis of matters of opinion, saying:

> ". . . Unless the question may be reduced to one of of fact, as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter." At 106.

In *Reilly* v. *Pinkus*, 338 U. S. 269 (1949) the Court in refusing to enforce a fraud order of the Postmaster General with reference to a weight reducing plan said:

> "... It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity." At 274.

See also *Donaldson* v. *Read Magazine*, 333 U. S. 178, 181-183 (1948); *Leach* v. *Carlile*, 258 U. S. 138, 140-141 (1922) (dissenting opinion of Justice Holmes in which Justice Brandeis concurred); *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407, 417, 430-432 (1921) (dissenting opinions of Justices Brandeis and Holmes) ("... and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man ...", at 437, Justice Holmes); *Stanard* v. *Olesen*, 74 S. Ct. 768, 770-771 (1954) (opinion of Mr. Justice Douglas); *cf. United States* v. *Ballard*, 322 U. S. 78 (1944).

This restrictive approach to censorial powers of prior restraint requires that the instant obscenity statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, be held to be only a criminal statute and nothing more. As the Court of Appeals for the District of Columbia Circuit stated in its opinion of May 31, 1956 and the dissent stated in its opinion of October 3, 1957, quoting with approval from that court's opinion in the second proceeding:

> "... The Authority under which the Department is said to be operating in this field is a criminal statute passed in 1873: it contains no language which directs the Department to refuse to transport

and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it. 'Some day Congress may perhaps give that authorization in specific terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here.' *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. 169 at 175, 221 F. 2d 42 at 48 (1954)." (J.A. 146, 176, App. I, p. 55, App. II, pp. 67-68).

D.

Authority In The Postmaster General To Exercise Prior Restraint Would give Him The Power Of Life And Death Over Periodical Publications.

In this country today periodical publications depend for their existence upon their prompt circulation by means of the United States mails. This is so for two reasons: in the first place, any delay in the distribution of a dated periodical means the death of that issue; in the second place, periodicals depend for their continued existence on dissemination through the mails because they receive a larger percentage of return on copies so distributed to subscribers than on copies disseminated by other means. (J.A. 34). As Justice Brandeis said in another connection in his dissenting opinion in *United States Ex rel Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407 (1921), with reference to a revocation by the Postmaster General of second-class mail rates:

> "If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be, for most of them, tantamount to a denial of the right of circulation. * * *" At 423.

Or as the Court of Appeals for the District of Columbia Circuit observed in *Pike* v. *Walker*, 121 F. 2d 37, *cert. denied* 314 U. S. 625 (1941):

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare * * *." At 39.

See also *Reilly* v. *Pinkus*, 338 U. S. 269 (1949) where with reference to a fraud order of the Postmaster General this Court observed:

> ". . . Unlike the Postmaster General, the FTC cannot bar an offender from using the mails, an order which could wholly destroy a business." * * *" At 277.

Nor is it any answer to say as the Court of Appeals for the District of Columbia Circuit does in its opinion of October 3, 1957 or as Circuit Judge Fahy does in his concurring opinion that the Post Office Department moved "expeditiously." (J.A. 173, 175, App. I, pp. 51-52, 54). The questions involved in such proceedings are never resolved expeditiously and any monthly periodicals which are involved in them will become obsolete long before those proceedings are at an end. It is not necessary to go beyond the monthly periodical, *Sunshine & Health*. The first proceeding against this periodical lasted more than three years, from April 1948 to May 1951 (J.A. 19.) The second proceeding lasted most of three years, from September 1952 to May 1955. The third proceeding, which began in December 1954, is nearing the end of its third year. It

certainly requires no more than a statement of these facts to demonstrate that a monthly magazine, which depends for its continued existence on its prompt circulation through the mails, would soon come to an end if the Postmaster General proceeded month after month against it as he has proceeded in the instant case against *Sunshine & Health*. A monthly periodical is obsolete if its circulation is delayed as much as two or three weeks, let alone two or three years.

Likewise it is no answer to say, as does the Court of Appeals for the District of Columbia Circuit in its opinion of October 3, 1957, that from 70% to 75% of petitioners' periodicals *Sunshine & Health* and *Sun Magazine* are distributed otherwise than through the mails. (J.A. 167, 173, App. I, pp. 44, 52). It is the 25% to 30% margin distributed by means of the mails that spells the difference between survival and suspension in the competition of the market in the United States today: on the copies distributed through the mails there is a larger percentage of return. (J.A. 34).[1]

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[1] It is probably no longer necessary at this date to meet the old contention that the use of the mails is a privilege which Congress can regulate at will. As Mr. Justice Harlan observed in a footnote in his dissenting opinion in *Roth* v. *United States*, 354 U. S. 476, (1957): "The hoary dogma of *Ex parte Jackson*, 96 U. S. 727, and *Public Clearing House* v. *Coyne*, 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., in *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430-433; Holmes, J., in *Leach* v. *Carlile*, 258 U. S. 138, 140; *Cates* v. *Haderline*, 342 U. S. 804, *reversing* 189 F. 2d 369; *Door* v. *Donaldson*, 195 F. 2d 764." At 504 n. 5.

II

The hearing examiner of the Post Office Department, the District Court for the District of Columbia, and the Court of Appeals for the District of Columbia Circuit applied standards of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957).

A.

The Hearing Examiner Of The Post Office Department And The Federal District Court, Whose Judgment Was Affirmed By The Court of Appeals For The District Of Columbia Circuit, Failed To Consider The Publications In The Instant Case As A Whole.

The test for obscenity as laid down in *Roth* v. *United States*, 354 U. S. 476 (1957) is this:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." At 489.

Although the hearing examiner for the Post Office Department and the federal district judge both stated that in determining obscenity, publications had to be considered as a whole, they nevertheless proceeded to make their determinations on the basis of a few pictures. Although admitting that the text in the instant publications was not obscene, they promptly proceeded to ignore this fact in arriving at their conclusion. As the Court of Appeals for the District of Columbia Circuit pointed out in its opinion of May 31, 1956 and as the dissent pointed out in its opinion of October 3, 1957:

> "* * * The Examiner of the Post Office Department and the District Court explicitly recognize in their

> opinions that the publications must be considered a
> a whole. Yet an examination of their opinions, a
> well as that of the Solicitor of the Post Office De
> partment, shows no effort to weigh the material con
> sidered objectionable against the rest of the con
> tents, or to weigh the risk in permitting the forme
> to circulate against the limitations on freedom o
> the press implicit in halting circulation of th
> latter." (J.A. 143, 179, App. I, p. 58, App. II, p. 65)

District Judge Kirkland based his finding of obscenit
on but five photographs in each of the publications in th
instant case (128 F. Supp. at 571-573, J.A. 129-133, App
III, pp. 88-92). These proscribed photographs occupied bu
3% of the space in the questioned issue of *Sunshine &*
Health and but 2% of the space in the questioned issue o
Sun Magazine.

B.

The Federal District Court, Whose Judgment Was Affirmed By The Court of Appeals For The District Of Columbia Circuit, In Finding Certain Pictures To Be Obscene Because They Were "Grotesque" and "Vile" Applied A Standard Of Obscenity In Conflict With That Which This Court Proscribed in *Roth* v. *United States*, 354 U. S. 476 (1957).

Moreover as to two of the five proscribed photographs i
the questioned issue of *Sunshine & Health* District Judg
Kirkland found them to be obscene because they were
"grotesque" and "vile", and one because it was "filthy"
(128 F. Supp. at 571-572, J.A. 130-131, App. III, pp. 88-90)
One of the proscribed pictures in *Sun Magazine* the judg
found to be obscene because of its "vulgarity" (128 F
Supp. at 572, J.A. 132, App. III, p. 93).

But under *Roth v. United States*, 354 U. S. 476 (1957)
only that in obscene "which deals with sex in a manner ap

pealing to prurient interest." At 487. In a footnote the Court further defined such material as that "having a tendency to excite lustful thoughts." At 487 n. 20. District Judge Kirkland did not even apply the proper standard of obscenity to some of the few pictures he found to be obscene. As the dissent in the court below pointed out in its opinion of October 3, 1957:

> "It is also questionable whether finding a picture 'grotesque' sufficiently complies with the Supreme Court's mandate requiring a finding of appeal to 'prurient interest.'" (J.A. 179-180, n. 7, App. I, p. 58, n. 7).

C.

The Court of Appeals For The District Of Columbia Circuit, In Judging The Publications In The Instant Case Rather Than The Conduct And Intent Of The Petitioners, Decided A Federal Question In A Way In Conflict With This Court's Decision In *Roth* v. *United States*, 354 U. S. 476 (1957).

As the dissent stated in its opinion of October 3, 1957:

> "In the instant case, the magazines 'advocate and explain nudism and the nudist mode of living.' *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. at 170, 221 F. 2d. at 43. One of the magazines has been published for over twenty yars. Their texts were found by the Post Office Department and the District Court not to be obscene." (J.A. 179, App. I, p. 58).

In addition as the court below pointed out in its opinion of May 31, 1956:

> ". . . Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. *Parmelee* v. *United States*, *supra*. 72 App. D. C. at 209, 113 F.

2d at 735; *United States* v. *One Book Entitled Ulysses, supra*, 72 F. 2d at 707, 708. 'Honest, sincere works must be distinguished from publications 'wholly for the purpose of profitably pandering to the lewd and lascivious.' *Parmelee* v. *United States, supra*, 72 App. D. C. at 209, 210, 113 F. 2d at 735, 736. If the matter of intent had been considered, substantial evidence of sincerity of motive, and lack of 'profitable pandering,' was contained in uncontroverted affidavits by the managing editor of the magazines in question, who is an ordained Baptist minister, and by the editor of the magazines, his daughter." (J.A. 143-144, App. II, p. 65).

Moreover, the pictures in the publications in the instant case were taken in nudist camps and were put in these publications for the purpose of illustrating the text and advancing the cause of nudism (J.A. 62, *Summerfield* v. *Sunshine Book Co.*, Oct. Term 1954, No. 665). Nudists feel that in order to present their ideas intelligently and effectively they need pictures to illustrate the text and show the healthy enjoyment that people derive from being out of doors in the nude. In the present state of development of the graphic arts, and in these days of pictorial newspapers, magazines and books, the force of this argument should readily be conceded. Indeed, in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940), the court quoted with approval this portion of the preface of Parmelee's book *Nudism in Modern Life*:

> "The illustrations depict better than words can describe the natural and normal life, and the beautiful and healthful methods and activities of a gymnosophic society. They portray them as actually applied in several European countries by many thousands of men, women and children of all classes,

> occupations and conditions, while the text discusses its scientific, hygienic, cultural, aesthetic, ethical and humanitarian significance." At 737.

Had the Court of Appeals for the District of Columbia Circuit taken into account the conduct and intent of Dr. Boone and his associates, their belief in nudism and their desire to advance it, their distribution of the publications in question in order to gain new converts to nudism, the absence of a dominating profit motive and the use the pictures in these publications to make more effective the presentation of the ideas of nudism, the scales should have been tipped in favor of the legality of these publications.

As Mr. Chief Justice Warren pointed out in his concurring opinion in *Roth* v. *United States*, 354 U. S. 476 (1957), the conduct and intent of the petitioners have an important relevance. Mr. Chief Justice Warren stated:

> "• • • It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." At 495.

Or as Mr. Chief Justice Warren observed in his dissenting opinion in *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957), a civil proceeding:

> "• • • this New York law places the book on trial. There is totally lacking any standard in the statute for judging the book in context. The personal element basic to the criminal laws is entirely absent. In my judgment, the same object may have wholly

different impact depending upon the setting in which it is placed. Under this statute, the setting is irrelevant.

"It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature * * *." At 445-446.

Years ago in *United States* v. *Kennerley*, 209 Fed. 119 (D. S. D. N. Y. 1913), Judge Learned Hand remarked:

"I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses." At 120-121.

The advocacy of nudism is as old as Plato, with modern adherents throughout the world. See *e.g.* Plato, *The Republic*, bk. 5, pp. 140-147 (B. Jowett transl., rev. ed. 1901); France, *Penguin Island*, bk. 2, c. 1 (A. W. Evans transl.); 1 Montaigne, *Essays*, c. 36, pp. 198-201 (Zeitlin transl. 1934); Parmelee, *Nudism In Modern Life*, 219-228 (5th ed. 1952). Surely the First Amendment protects such advocacy, as well as any means which are reasonably and fairly relevant to it. This includes pictures.

But even if Judge Kirkland was right in finding a few of the pictures to be obscene, still we submit that any public interest served by barring from the mails and from the people of the United States petitioners' ideas is infinitesimal when compared with the loss suffered by prospective readers of the magazines and of the writings of

others as well as petitioners. We of course understand that the world will not come to an end if subscribers to the challenged periodicals in the instant case will not receive them through the mails. Nevertheless, if the Postmaster General has the powers of censorship which he claims here, then he can keep from the American people such works of literature, art, science and persuasion as may run afoul of the notions of obscenity of one or more of a few postoffice officials in Washington.

We submit that if one will take into account the conduct and intent of Dr. Boone and his associates, their interest in promoting the cause of nudism, their circulation of the periodicals *Sunshine & Health* and *Sun Magazine* to this end, and judge the challenged issues as a whole in the light of these facts, one should come to the conclusion that so judged they are not obscene.

III

The purported administrative hearing in the Post Office Department, in which all evidence was excluded save the challenged publications, violated due process.

The Post Office Department wants to treat the issue of obscenity on a *sui generis* basis. It wants no hearings, and if there are any, it does not want them under the aegis of the Administrative Procedure Act. It wants no evidence: it does not want to hear the testimony of experts or anyone else on community standards or on the effect of the publications in question on readers. All the Post Office Department wants is to have some officials in Washington look at the questioned publications and decide for the whole

country whether they are safe for the people to read or see. See *Attorney General's Committee On Administrative Procedure, The Post Office Department* 95-98 (1940).

In line with this approach the Postmaster General in the instant case provided an *ad hoc* hearing procedure. At the resultant gathering, the hearing examiner twice stated that the proceeding was not being conducted within the framework of the Administrative Procedure Act (J.A. 82). He twice stated that the proceeding was being conducted without the benefit of any published rules of practice or procedure (J.A. 78, 80). And no such published rules or regulations in fact existed. In this respect the procedure violated §3(a)(2) of the Administrative Procedure Act. 5 U. S. C. §1002(a)(2), 60 Stat. 238. Promptly after the purported hearing the hearing examiner made his findings; with equal promptness, after an appeal without hearing or argument, those findings were affirmed. The final result confirmed the statement of the local postmaster, preceding the "hearing", that the Solicitor had already determined that the publications were nonmailable (J.A. 40, 75). Except for a notice and a gathering of the parties this purported hearing was not a hearing in anything but name.

Moreover, petitioners repeated offers of expert testimony on community standards and on the effect of petitioners' publications on readers were uniformly rejected.[2] But under *Roth* v. *United States*, 354 U.S. 476 (1957) the standard of obscenity is this:

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[2] "[To some judges] the obscene is self-evident, and they neither need nor want the help of evidence concerning a book's value in these respects. Fortunately, few judges are afflicted with this form of bigotry and obtuseness." Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 348 (1954).

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." At 489.

Surely under this test evidence of contemporary community standards is relevant and material. The Post Office Department will have none of it. Again surely under this standard of obscenity, evidence of the effect of questioned publications upon readers is relevant and material. But again the Post Office will have none of it.

The arbitrary and unpredictable results of such an unconstitutional procedure may readily be gathered from some testimony which Mr. Roy C. Frank, a former Solicitor of the Post Office Department, gave before the House Select Committee on Current Pornographic Materials (the Gathings Committee) as to how the department arrived at its determination of obscenity:

> "Mr. Frank: * * * I may say, however, that Mr. Mindel hasn't the final say on it. For example, if he writes an opinion, it goes to the Assistant Solicitor, who looks it over, and if he disagrees, the two will argue it out.
>
> "If the Assistant Solicitor agrees, it goes to Mr. Doyle, the Associate Solicitor, who is authorized to sign my name to it, if he agrees.
>
> "If he disagrees, he brings it in to me, and we will discuss it, and I may say, along the lines of what the captain testified to, that sometimes you can get five people together, and you can give them five pieces of mail, and ask them to mark them, and you will get five different results, because in some cases it is just one of those things that depends on your own personal ideas and your own bringing-up; it de-

pends upon how strongly you feel about things, and there are some types of that material that you just can't get two people to agree on no matter how reasonably and how objectively they look upon it. It is just an honest difference of opinion. We experience it all the time, so we have our conferences, and we decide what is going to be the best thing to do."

Counsel for the Gathings Committee tried to help out Mr. Frank:

> "Mr. Burton: Those cases are frequently called your border-line cases, are they not?"

But Mr. Frank was not to be helped:

> "Mr. Frank: Border-line cases, that is right; and may I say there are many of them, Mr. Counsel." *Report of the Select Committe On Current Pornographic Materials,* H. R. Rep. No. 2510, 82d Cong., 2d Sess. 94-95 (1952).

The consequences of such a procedure should give one great pause. Especially should they do so when one reflects that in the recent past alone, since 1940, the Post Office Department has stopped mailings of the following books, among many others: James Jones, *From Here to Eternity;* Alberto Moravia, *The Woman of Rome;* Ernest Hemingway, *For Whom the Bell Tolls;* Lillian Smith, *Strange Fruit*; John O'Hara, *Appointment in Samarra*; Emile Augiers, *Diana*; *Memoirs of Casanova*; Erskine Caldwell, *Tobacco Road*, and *God's Little Acre*; Simone de Beauvoir, *The Second Sex;* Aristophanes, *Lysistrata;* and Guy de Maupassant, *Mademoiselle Fifi.* What it has done and sought to do to periodicals is even worse.

One can add a further disturbing factor: decisions made by such a group of federal officials in Washington will be

applicable to the whole country. The words of Mr. Justice Harlan in his dissenting opinion in *Roth* v. *United States*, 354 U. S. 476 (1957), become poignantly appropriate:

> "* * * But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation * * *. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both of the letter and spirit of the First Amendment.
>
> "I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship * * *." 354 U. S. at 506-507.

If the position of the government in this case is sustained then we are really in danger of having the Post Office Department also become a Department of Culture for the whole country.

CONCLUSION

Since the Court of Appeals for the District of Columbia Circuit decided an important question of federal law which has not been but should be settled by this Court, namely, that a federal obscenity statute with criminal sanctions, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, authorizes the Postmaster General to exercise censorial powers of prior restraint over periodical publications by

withholding them from dispatch through the mails pending a determination of the issue of obscenity; since the hearing examiner of the Post Office Department, the federal district judge, and the Court of Appeals for the District of Columbia Circuit applied standards of obscenity in conflict with that which this court prescribed in *Roth* v. *United States* 354 U. S. 476 (1957); and since the Court of Appeals for the District of Columbia Circuit approved a hearing procedure which violated the due process clause of the Fifth Amendment; this petition for a writ of certiorari should be granted.

Respectfully submitted,

O. John Rogge
Attorney for Petitioner
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New York 13, New York

Appendix I

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12622

SUNSHINE BOOK COMPANY and SOLAIR UNION NATURISME, INC., APPELLANTS,

v.

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States, APPELLEE.

On Rehearing En Banc

Decided October 3, 1957

Mr. John Rogge for appellants.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Messrs. Samuel D. Slade* and *Joseph Langbart*, Attorneys, Department of Justice, were on the brief, for appellee.

Mr. Edward deGrazia filed a brief on behalf of American Civil Liberties Union, as *amicus curiae*, urging reversal.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, *Circuit Judges*, sitting *en banc*. (Circuit Judge

BURGER took no part in the hearing or consideration of this case.)

DANAHER, *Circuit Judge*, with whom Circuit Judges Prettyman, Wilbur K. Miller and Bastian concur, Circuit Judge Fahy concurring in the result and stating his views separately: Appellants, Sunshine Book Company and Solair Union Naturisme, Inc., sought in the District Court to enjoin the Post Office Department from refusing to transmit by mail the February, 1955, issue of "Sunshine & Health" Magazine and the January-February, 1955, issue of Sun Magazine. A Hearing Examiner in the Post Office Department had decided that the named issues are nonmailable because obscene as that term is used in 18 U.S.C. §1461 (1952).[1]

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[1] Pertinent portions applicable when the proceedings herein were commenced read:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

* * * *

"*Is declared* to be *nonmailable* matter and *shall not be conveyed in the mails* or delivered from any post office or by any letter carrier." (Emphasis supplied.) Cf. 18 U.S.C. §§ 1461, 1465 (Supp. IV 1957).

Pertinent regulations may be found in 39 C.F.R. as §§ 36.1, 36.2 and 36.7, issued under 5 U.S.C. §22 (1952) and 5 U.S.C. §369 (1952), as follows:

"§ 22. Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

"§369. Duties of Postmaster General. It shall be the duty of the Postmaster General:

* * * *

"Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service."

Appendix I

After review of the appellants' exceptions to the Initial Decision and recommendations of the Hearing Examiner and the Department's reply thereto, the Solicitor of the Post Office Department affirmed. Concluding that the magazines contained photographs of naked men, women and children, are "obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country," and noting that advertisements in the magazines indicate that they are offered freely for sale to the general public who are not members of a nudist organization, the Solicitor directed that the postmaster at Mays Landing, New Jersey, be instructed to treat the named issues as nonmailable.

In the District Court, appellants asked a declaration that the determination and order of the Department as applied be declared invalid as unconstitutional; that the Department be restrained permanently from withholding from dispatch in the United States mails the named issues of the magazines, and future numbers of these publications said to be substantially similar to the named issues here involved and to the magazines considered as exhibits in an earlier action[2]; a preliminary injunction

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[2] Summerfield v. Sunshine Book Company, 95 U.S. App. D.C. 169, 221 F. 2d 42 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955), which involved a proceeding under 39 U.S.C. §259a. There we concluded that the statute did not authorize the Postmaster General to predicate an order refusing mail privileges upon future, unpublished issues of the magazines despite the fact that past issues had contained allegedly obscene matter. Congress has since developed temporary and summary impounding procedures, free from the requirements of the Administrative Procedure Act, to be followed in such cases. See the Act approved July 27, 1956, 39 U.S.C. §259b (Supp. IV 1957). See S. Rep. No. 2234, 84th Cong., 2d Sess., 2 U.S. Code & Ad. News p. 3597 (1956). These sections are not involved in the instant case.

to the same effect pending final relief; and that the named issues be declared not to be obscene. Judge Kirkland denied relief, ruling that there was a substantial basis in fact and in law to support the Department's determination and, independently as trier, he concluded that the named issues, being obscene, are nonmailable.[3] After the appeal had here been argued, the court ordered rehearing *en banc*.[4]

Facts alleged, found and appearing of record may be succinctly summarized. About December 23, 1954, appellant Sunshine completed the printing of approximately 40,000 copies of the February, 1955, issue of the publication, "Sunshine & Health" of which 10,000 copies were to be circulated through the mails Approximately 30% of the total circulation of the second publication, "Sun-Magazine," was to be distributed through the mails. Appellants alleged that they receive a larger percentage of return on copies disseminated by mail to subscribers than from the sale of copies distributed by other means such as sales at news-stands. Between December 24, 1954, and December 31, 1954, appellant Sunshine Book Company caused some 400 copies of its February 1955 issue to be offered for mailing as third class matter through the post

[3] His opinion with its detailed findings and conclusions has been reported at length. See Sunshine Book Company v. Summerfield, 128 F. Supp. 564 (D.C.D.C. 1955).

[4] We heard argument September 25, 1956. We decided to postpone our decision herein because of the pendency in the Supreme Court of several cases, the decisions in which were deemed likely to have an important, if not controlling, bearing on the problems here raised. See, e.g., Roth v. United States, 354 U.S. 476 (1957); Alberts v. California, 354 U.S. 476; Kingsley Books, Inc. v. Brown, 354 U.S. 436.

office at Mays Landing, New Jersey. The Postmaster under date of December 29, 1954, submitted a sample copy of the questioned issue to the Solicitor for the Post Office Department for instructions, pursuant to the applicable regulation.[5] Under date of December 30, 1954, he was advised by the Solicitor that the questioned copies "subject to inspection" should be withheld from dispatch and that the senders should be informed that they might have "opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under . . . 39 C.F.R. 36.2" Under date of December 31, 1954, the postmaster informed the senders as to the opportunity to be heard, but erroneously also wrote that the questioned issue "is nonmailable and must be withheld from dispatch." The Solicitor under date of January 6, 1955, advised the senders as to the postmaster's error and pointed out that no ruling or determination as to mailability had been made either by the Solicitor or by any authorized person, that a hearing had been assigned for January 10, 1955, and that "every effort will be made to insure an expeditious consideration and ruling in this matter." Similar notice was given to Solar Universale Nudisme Magazine of a hearing assigned for January 11, 1955, to determine the mailability of its January-February, 1955, issue of Sun Magazine. On January 10, 1955, the Hearing Examiner "at the request of counsel for the publisher and with the agreement of the Solicitor" continued the hearings as to both magazines until January 17, 1955, when the hearings went

[5] C.F.R. § 36.7 and see *supra* note 1.

forward. On appeal from the examiner's initial decision, the Solicitor affirmed January 28, 1955, reciting details as to the photographic contents of the questioned publications which he found were offered freely for sale to the general public.

Meanwhile, proceedings had been instituted in the District Court on January 6, 1955, and, on January 18, 1955, the motion for preliminary injunction was denied. It was then ordered that "the status quo" be maintained until the completion of the administrative proceedings and that the case be advanced for trial to be heard January 31, 1955. Accordingly, the case was then heard and after argument, the court's oral ruling was pronounced. Findings of fact and conclusions of law were thereafter filed, and the judgment dismissing the appellants' amended complaint was entered February 16, 1955.

In court the Department stood upon the record of the papers and opinions which had been filed in the administrative proceeding which, without objection, were received. The trier offered to hear testimony. Appellants presented no "live" witnesses, and had none in court. In colloquy with the trial judge appellants' counsel outlined the nature of such testimony as might have been produced: as to community standards; that the photographs do not violate such standards; that nudism is growing in American life, "for instance, in the home"; and analysis, comparatively, of some nude photographs in certain magazines and of the sequence in "La Tuka," a motion picture of African tribal life. The trier ruled the proffer was irrelevant in terms of American com-

munity life measured by legal standards as applied to the magazine issues before the court. Counsel, in effect, concluded: "This brings us, then, far quicker than I thought we would get there to the issue of obscenity." It was the issue in the District Court, and is the issue here.

The statute[6] under which the proceedings went forward not only makes criminal the use of the mails for the transmission of proscribed matter, including obscene, lewd or lascivious pictures or publications of an indecent character, but all such matter is declared to be "non-mailable" and "shall not be conveyed in the mails."

Appellants' contentions that the statute "usurps powers impliedly and expressly reserved to the states in violation of the First, Ninth, and Tenth Amendments to the United States Constitution" have been answered by the Court in *Roth* v. *United States*,[7] where it was held expressly that "obscenity is not within the area of constitutionally protected speech or press." The majority further said:

> "Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the

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[6] 18 U.S.C. § 1461 (1952), *supra* note 1, was later amended by the Act of June 28, 1955, U.S.C. § 1461 (Supp. IV 1957). Congress sought "to enlarge section 1461 of title 18, United States Code, so as to include within the prohibition of said section all matter of obscene nature, whether or not said matter had fallen within the more restricted definition contained in the statute." S. REP. No. 113 to accompany S. 600, 84th Cong., 1st Sess. The Report further advised the Senate that passage of the bill "will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals."

[7] 354 U.S. 476, 485 (1957).

States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that *'Congress* shall make *no law* . . . abridging the freedom of speech, or of the press . . . .' (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, §8, cl. 7.'"[8]

The command of the statute is such that if the issues of the magazines in question are nonmailable under 18 U.S.C. §1461, the Post Office Department is bound to deny access to the mails.[9] Arguing that a conclusion of "obscenity" is a matter of *opinion*, appellants insist that the Postmaster General's order was invalid as a matter of law. The Court tells us however that, while there may be marginal cases, obscenity is recognizable and may be distinguished from the portrayal of sex in art, literature and scientific works. "Obscene material is material which deals with sex in a manner appealing to prurient inter-

[8] *Id.* at 491-92.

[9] Roth v. Goldman, 172 F. 2d 788 (2 Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); "It shall be the duty of the Postmaster General . . . to . . . execute all laws relative to the Postal Service." 5 U.S.C. § 369 (1952); as to the duty and power of the Postmaster General, compare Bates & Guild Co. v. Payne, 194 U.S. 106 (1904). Where the problem turns upon the exercise of judgment when the contents have not been found to be obscene, a wholly different case is presented. See, e.g., Hannegan v. Esquire, Inc., 327 U.S. 146, 149, 158 (1946).

est." The Court observed that the trial court "sufficiently followed the proper standard," having applied the test "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Thus, the Court concluded:

> "In summary, then, we hold that [the federal statute] applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited."[10]

Here, the trial judge carefully reviewed the authorities and applied the test[11] we had laid down in *Parmelee* v. *United States*[12] and which was quoted verbatim in the *Roth* charge, approved by the Court. Supplied by the trial judge were extensive, particularized descriptions of the offending and offensive material which need not here be repeated, as they speak for themselves. We deem the conclusions reached by the trial judge to be amply sustained. Appellants argue to us that the issue of obscenity is "not foreclosed by the finding of the trial court and is to be independently reviewed and determined by this court." Were we, as is urged, to go beyond the trier and to reach our own conclusion, we would have no hesitancy in deciding that what is before us is "ma-

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[10] 354 U.S. at 492 (1957).

[11] *Supra* note 3. Sunshine Book Company v. Summerfield, 128 F. Supp. at 568.

[12] 72 App. D.C. 203, 113 F. 2d 729 (D.C. Cir. 1940).

terial which deals with sex in a manner appealing to prurient interest," and hence is obscene, as *Roth* tells us.

Appellants ask us to say that our earlier decision[13] is *res judicata*. Quite apart from the fact that the many issues of the publications there involved differ from the exhibits before us in no substantial particular so far as their common pattern of nudity is concerned, some of them were more, and some less offensive in their portrayal of sexual indicia than the photographs in the exhibits with which we are now concerned. Most important, however, we did not in the earlier case reach or decide any such issue. On the contrary, we were concerned solely with the scope of the order of the Postmaster General which, we concluded, exceeded his authority. Indeed, we expressly authorized him to amend his orders to conform to the limitations we defined, and we found it unnecessary to inquire into or to pass upon his finding as to obscenity. Since we did not decide that the orders lacked a predicate of obscenity, appellants' reliance upon *res judicata* is totally without basis.

Were we, as appellants asked, to refer to the many issues received as exhibits in the earlier cases, we might readily spell out a continuous pattern of dissemination of nude photographs, a pattern in existence for many years. We would not ignore *Sunshine Book Co.* v. *McCaffrey*[14] where the court at page 483 said:

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[13] *Supra* note 2.

[14] 112 N.Y.S. 2d 476. There the appellants likewise were plaintiffs who sought a declaratory judgment and a permanent injunction against the Commissioners of Police and of Licenses of the

Appendix I

"Where the dominant purposes of nudity is to promote lust, it is obscene and indecent. The distribution and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses. The sale of these magazines is not limited to any mailing list of members or subscribers. They are sold and distributed indiscriminately to all who wish to purchase the same. Men, women, youths of both sexes, and even children, can purchase these magazines. They will have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disastrous."

Nor do we see in the circumstances here a "prior restraint" against which to inveigh. The statute declares certain matter to be nonmailable which "shall not be conveyed in the mails." It may be supposed that the Post Office Department is not bound to sit idly by if instruments of crime, proscribed as nonmailable, are nonetheless offered for mailing. We may assume that the Department is not bound to permit the crime to be committed and only thereafter to proceed against one who mails the offending material. Here pursuant to the departmental regulations, the postmaster sought instructions. An administrative hearing was ordered which pro-

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City of New York. Their publications "Sunshine & Health" and "Sun Magazine" were before the court and appellants had been charged with violating § 1141 of the Penal Law of New York, referred to in Kingsley Books, Inc. v. Brown, *supra* note 4, 354 U.S. at 442.

ceeded expeditiously, both before the Department and the District Court. After application of the pertinent and appropriate standard, the questioned exhibits were found to be nonmailable. Here, there was no interference with some 30,000 copies of the questioned issue of "Sunshine & Health," and with some 70% of the questioned issue of "Sun Magazine," distributed otherwise than through the mails. Here was no injunction restraining the contemplated distribution of the publications to the public at large. Rather, only after hearing in accord with procedural safeguards antecedent to a determination of nonmailability, the Postmaster General has ruled that the facilities of the Post Office Department are not to be utilized, and the offending material "shall not be conveyed in the mails." There was no seizure, there was no restraint upon "the dissemination of future issues of a publication because its past issues had been found offensive."[15]

We are satisfied that it has been correctly determined that the issues of the magazines here in suit comprise nonmailable matter within the meaning of the statute. There is no error.

Affirmed.

FAHY, *Circuit Judge, concurring:* In addition to making it a crime to mail the matter it describes, the statute, 18 U.S.C. §1461 (1952), declares the matter to be non-

[15] Kingsley Books, Inc. v. Brown, *supra* note 4, 354 U.S. at 445.

mailable, and provides that it shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Thus, as it seems to me, the statute is not solely a criminal one but is also one which closes the mail to obscene matter. This is not inconsistent with the First Amendment, *Roth* v. *United States*, 354 U.S. 476, or beyond the federal power; so that even though there has been no conviction of crime, there is reached the question whether the matter is of the kind the statute describes as nonmailable. The standards for determining this have been laid down by the Supreme Court, and the Department was here governed by equivalent standards; the Department applied the standards of the "dominant theme" and of the "contemporary community."

I do not disagree with the conclusion reached. Pictures permeate the magazine and the pictures are dominated by those which the contemporary community deems indecent. If this is so it cannot be but immaterial that much innocent text also appears in the magazine.

This leaves the question whether the departmental procedure met the requirements of due process. In *Kingsley Books, Inc.* v. *Brown*, 354 U.S 436, the Court sustained the New York "limited injunctive remedy" under the Fourteenth Amendment, applicable to state statute. I think the prompt and speedy administrative process accorded in the present case cannot be distinguished on a Fifth Amendment level, applicable to federal statute, from the procedure sustained in *Kingsley Books*. After the magazine was held, a longer time elapsed here than in that case before the nonmailable decision was reached;

but the Department moved expeditiously—in fact appellant requested additional time.[18]

Further congressional attention to procedure might be desirable, but this is not to say that the courts should hold invalid the procedure here followed, unless it is to be held that only a court or jury is capable under the Constitution of determining in the first or preliminary instance the question of obscenity.

WASHINGTON, *Circuit Judge*, with whom EDGERTON, *Chief Judge*, and BAZELON, *Circuit Judge*, join, dissenting:

"Obscenity is not expression protected by the First Amendment." *Roth* v. *United States*, 354 U.S. 476, 492 (1957). "Obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries, a public evil, a public nuisance, a public pollution." *Matter of Excelsior Pictures Corp.*, 3 N.Y. 2d. 237, ——, 165 N.Y.S. 2d 42, 49 (1957). "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted." *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 158 (1946). Well established though these propositions may be, they do not answer the hard questions of an individual case. Has the publication been found "obscene" by a proper tribunal, applying proper standards? Has the punishment or remedy been authorized by proper legislation?

In the instant case, these questions have not yet been adequately answered. In the first place, it is not at all

[redacted] 80 U.S. App. D.C. 129, 149 F. 2d 511, the order [illegible] the pamphlet from the mails was issued without notice or hearing.

clear that the Post Office Department possesses any power to censor any class of mail, sealed or unsealed. Certainly Congress has never given such a power in so many words, nor has the Supreme Court ever expressly recognized the existence of such a power. The authority under which the Department is said to be operating in this field is a criminal statute passed in 1873:[1] it contains no language which directs the Department to refuse to transport and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it. "Some day Congress may perhaps give that authorization in specific terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here." *Summerfield* v. *Sunshine Book Co.*, 95 U.S. App. D.C. 169 at 175, 221 F. 2d 42 at 48 (1954).[2] "All that Congress meant by this [1873] act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished." *Ex parte Jackson*, 96 U.S. 727 at 736 (1877).

The postal power permits the Federal Government to impose criminal sanctions for using the mails to distribute obscene materials. *Roth* v. *United States*, *supra*. Such sanctions, of course, are accompanied by the safeguards of a jury trial. See Brennan, J., dissenting in *Kingsley*

[1] REV. STAT. § 3893 (1875), as amended, 18 U.S.C. § 1461 (SUPP. IV, 1957).

[2] We were there speaking of another postal statute, 39 U.S.C. § 259(a) (1952).

Books, Inc. **v.** ***Brown,*** **354 U.S. 436, 447 (1957). Prior restraint is another story. A state statute has been upheld which permitted a limited form of judicial prior restraint against materials alleged to be obscene, through temporary injunction followed by prompt trial. See** ***Kingsley Books, Inc.*** **v.** ***Brown, supra.*** **It may be that the postal power would provide a basis for a Federal statute authorizing a similar form of judicial control. But an administrative prior restraint, not plainly authorized by statute and not subject to specified standards and safeguards, is of highly doubtful validity, to say the least.** ***Compare Holmby Productions, Inc.*** **v.** ***Vaughn,*** **350 U.S. 870, 919 (1955), reversing 177 Kan. 728, 282 P.2d 412 (1955).**

It may be argued that the duty of the Postmaster General "to execute all laws relative to the Postal Service," 5 U.S.C. §369 (1952), gives him some measure of authority over materials deposited in the mail in alleged violation of the criminal statute. It may be said, too, that the statute makes the materials non-mailable, and forbids their handling. These arguments hardly suffice. Congress has always "zealously watched and strictly confined" any proposal to empower the Postmaster General to refuse to handle mail because of its content. See ***Hannegan*** **v.** ***Esquire, Inc., supra,*** **at 156, n. 18. Surely the courts must take a like attitude, even if they conclude that the present statute does give the Postmaster General some part of the authority he now claims.[3] Certainly, under**

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[3] *Cf.* Roth v. Goldman, 172 F. 2d 788 (2d Cir.), *cert. denied*, 337 U.S. 938 (1949); One, Inc. v. Olesen, 241 F. 2d 772 (9th Cir.), cert. pending, 26 U.S.L. WEEK 3046 (1957).

any view, the courts must intervene if improper standards have been applied in making a determination of obscenity.[4] That has occurred in this case.

The test of obscentiy is "whether to the average person, applying contemporary community standards, the *dominant* theme of the material *taken as a whole* appeals to prurient interests." (Emphasis added.) *Roth* v. *United States*, *supra* at 489.[5] We expressed a similar thought in *Walker* v. *Popenoe*, 80 U.S.App.D.C. 129,130, 149 F.2d 511, 512, (1945), where we said: "The statute [now 18 U.S.C. §1461] does not bar from the mails an obscene phrase or an obscene sentence. It bars an obscene 'book, pamphlet . . . or other publication . . . .' If a publication as a whole is not stimulating to the senses [*i.e.*, does not "arouse the salacity"] of the ordinary reader, it is not within the statute. . . . The *dominant* effect of an entire publication determines its character." (Emphasis in original.) See also *Parmelee* v. *United States*, 72 App.

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[4] There is broad authority to review even factual matters when freedom of speech and of the press is involved. *Cf.* Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Reed J., concurring in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952); Dye, J., dissenting in Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 356, 113 N.E. 2d 502, 512 (1953), *reversed sub nom.* Superior Films v. Dept. of Education, 346 U.S. 587 (1954).

[5] The test traditionally applied by the English courts was stated in Regina v Hicklin [1868], L.R. 3 Q.B.D. 360, 371 "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *But see* Regina v. Martin Secker Warburg, Ltd. [1954], 2 All E.R. 683. That test "might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." Roth v. United States, 354 U.S. at 489.

D.C. 203, 113 F.2d 729 (1940); *United States* v. *Dennett*, 39 F.2d 564 (2d Cir. 1930); *United States* v. *One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934); *United States* v. *Levine*, 83 F.2d 156 (2d Cir. 1936). In these cases, works which the courts found to be of genuine sociological, medical, or literary merit were held not obscene, although portions of them, taken from context, might appear otherwise.

In the instant case, the magazines "advocate and explain nudism and the nudist mode of living." *Summerfield* v. *Sunshine Book Co.*, 95 U.S.App.D.C. at 170, 221, F.2d at 43. One of the magazines has been published for over twenty years. Their texts were found by the Post Office Department and the District Court not to be obscene. But both the Department and the District Court thereupon proceeded to deal with the illustrations in the magazines merely as such. The Examiner of the Post Office Department and the District Court explicitly recognize in their opinions that the publications must be considered as a whole.[6] Yet an examination of their opinions, as well as that of the Solicitor of the Post Office Department, shows no effort to weigh the material considered objectionable against the rest of the contents, or to weigh the risk in permitting the former to circulate against the limitations on freedom of the press implicit in halting circulation of the latter.[7]

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[6] See Walker v. Popenoe, *supra* at p. 130 of 80 U.S. App. D.C., at p. 512 of 149 F. 2d.

[7] It is also questionable whether finding a picture "grotesque" sufficiently complies with the Supreme Court's mandate requiring a finding of appeal to "prurient interest." *Compare* Sunshine Book Co. v. Summerfield, 128 F. Supp. 564, 571 (D.D.C. 1955), *with* Roth v. United States, 354 U.S. at 489 (1957).

Appendix I

Another aspect of the case is equally disturbing. More than a decade ago we held in *Walker* v. *Popenoe, supra,* that a hearing must precede the barring of published matter from the mails. Here, the Department refused to accept the magazines for mailing, and held a hearing after its refusal had become effective.[8] We expressly condemned such an intererence with freedom of the press in the *Walker* case, where we said:

"We are not impressed with the argument that a rule requiring a hearing before mailing privileges are

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[8] The District Judge found that the refusal of the Post Office Department to transmit the magazines in question began on or about December 23, 1954. By letter of December 30, 1954, the Solicitor of the Post Office Department acknowledged a letter of December 29, 1954, from the Postmaster of Mays Landing, New Jersey, which set forth the action taken. The Solicitor advised that the magazines "should be withheld from dispatch," except for copies submitted for first class mailing, and that the senders "should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable . . . by offering through appearance at this [the Solicitor's] office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit."

The Postmaster of Mays Landing transmitted this information to appellant by letter of December 31, 1954. He added that the magazines in question were "nonmailable and must be withheld from dispatch." By letter of January 6, 1955, to appellant, the Solicitor acknowledged that the Postmaster's statement as to nonmailability was in error, "no ruling or determination either of mailability or non-mailability having yet been made. . . . . " He also gave notice of a hearing on the question to be held on January 10, 1955. But no action was taken to transmit the magazines in the mail. At appellant's request, the hearing was postponed to January 17, 1955. At the hearing, the Examiner ruled, correctly, we think, and without objection by the Post Office Department, that the burden of proof rested on the Post Office Department rather than appellant. An initial decision was handed down by the Examiner on January 20, 1955, and affirmed by the Solicitor on January 28, 1955. It is thus evident that appellant's magazines were barred from the mails for almost a month before the hearing and the initial administrative decision that they were unmailable.

suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here." 80 U.S.App.D.C. at 132, 149 F.2d at 514.[9]

For these reasons the order of the Post Office Department should be held invalid. Under all the circumstances —the passage of time and the disregard by the Post Office Department of our ruling in the *Walker case*—further administrative proceeding with respect to the magazine issues here involved should not be permitted. The case should be remanded to the District Court with instructions to issue an injunction permanently restraining enforcement of the Department's order.

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[9] See Roth v. United States, 1 L. Ed. 2d 34 (1956) (per Harlan, Circuit Justice).

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,622—April Term, 1957

C.A. 74-55

SUNSHINE BOOK COMPANY and SOLAIR UNION NATURISME, INC.,

Appellants,

v.

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Appellee.

APPEAL FROM the United States District Court for the District of Columbia.

BEFORE: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc. (Circuit Judge Burger took no part in the hearing and consideration of this case.)

THIS CAUSE came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: October 3, 1957.

Per Circuit Judge Danaher.

Separate concurring opinion by Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge Washington, with whom Chief Judge Edgerton and Circuit Judge Bazelon join.

Appendix II

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12622

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC., APPELLANTS,

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided May 31, 1956

Mr. Murray A. Gordon, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, and *Mr. O. John Rogge*, for appellants.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of Court, with whom *Messrs. Samuel D. Slade* and *Joseph Langbart*, Attorneys, Department of Justice, were on the brief, for appellee.

Mr. Edward de Grazia filed a brief on behalf of American Civil Liberties Union, as *amicus curiae*, urging reversal.

Appendix II

Before EDGERTON, Chief Judge, and WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge*: The complaint here sought to enjoin the Post Office Department from refusing to transmit by mail the February, 1955, issue of Sunshine & Health Magazine and the January-February, 1955, issue of Solaire Universelle Nudisme Magazine. A hearing examiner in the Post Office Department decided that the issues in question are unmailable under 18 U.S.C. § 1461 (1952) because they are "obscene, lewd, lascivious and indecent." The Solicitor of the Department affirmed, and an appropriate order was entered. In the injunction proceeding the District Court found as a fact that "the magazines are obscene, lewd, lascivious, filthy and indecent." Its conclusions of law were that there was substantial evidence to support the Post Office Department's conclusion, and, independently, that the magazines are non-mailable. It dismissed the complaint. *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564 (D. D.C. 1955). This appeal followed.

The two particular issues of the magazines in question here conform essentially to the description of prior issues of these magazines set forth in *Summerfield* v. *Sunshine Book Co.*, 95 U.S.App.D.C. 169, 221 F.2d 42 (1954), cert. denied, 349 U. S. 921 (1955). A more detailed description of the pictorial content of the magazines is to be found in the opinion of the District Court, cited above. It is unnecessary to enlarge upon their content in this opinion.

Whatever the scope of our authority to review factual determinations in situations such as this, and we think

it is a broad one when First Amendment considerations are involved,[1] it is clear that we must intervene if improper standards have been applied in making the determination of obscenity. We think that has occurred here.

In *Walker* v. *Popenoe*, 80 U.S.App.D.C. 129, 130, 149 F.2d 511, 512 (1945), we said (quoting from *United States v. Levine*, 83 F.2d 156, 158 (2d Cir. 1936)): "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands." See also *Parmelee* v. *United States*, 72 App.D.C. 203, 113 F.2d 729 (1940); *United States* v. *Dennett*, 39 F.2d 564 (2d Cir. 1930); *United States* v. *One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). In these cases, works which the courts found to be of genuine sociological, medical, or literary merit were held not obscene, although portions of them, taken from context, might appear otherwise.

In the instant case, the magazines "advocate and explain nudism and the nudist mode of living." *Summerfield* v. *Sunshine Book Co.*, 95 U.S.App.D.C. at 170, 221 F.2d at 43. Their texts were found by the Post Office Department and the District Court not to be obscene. But both the Department and the District Court thereupon pro-

[1] *Cf.* Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Reed, J., concurring in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952); Dye, J., dissenting in Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 356, 113 N.E. 2d 502, 512 (1953), *reversed sub nom.* Superior Films v. Dept. of Education, 346 U.S. 587 (1954).

ceeded to deal with the illustrations in the magazines merely as such. The Examiner of the Post Office Department and the District Court explicitly recognize in their opinions that the publications must be considered as a whole.[2] Yet an examination of their opinions, as well as that of the Solicitor of the Post Office Department, shows no effort to weigh the material considered objectionable against the rest of the contents, or to weigh the risk in permitting the former t circulate against the limitations on freedom of the press implicit in halting circulation of the latter. Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. *Parmelee* v. *United States*, *supra*, 72 App.D.C. at 209, 113 F.2d at 735; *United States* v. *One Book Entitled Ulysses*, *supra*, 72 F.2d at 707, 708. "Honest, sincere" works must be distinguished from publications "wholly for the purpose of profitably pandering to the lewd and lascivious." *Parmelee* v. *United States*, *supra*, 72 App.D.C. at 209, 210, 113 F.2d at 735, 736.[3] If the matter of intent had been considered, substantial evidence of sincerity of motive, and lack of "profitable pandering," was contained in uncontroverted affidavits by the managing editor of the magazines in question, who is an ordained Baptist minister, and by the editor of the magazines, his daughter.

Another aspect of the case is equally disturbing. More than a decade ago we held in *Walker* v. *Popenoe*, *supra*,

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[2] See Walker v. Popenoe, *supra* at p. 130 of 80 U.S. App. D.C. at p. 512 of 149 F. 2d.

[3] The latter phrase was quoted from Lynch v. United States, 285 Fed. 162, 163 (7th Cir. 1922).

that a hearing must precede the barring of published matter from the mails. Here, the Department refused to accept the magazines for mailing, and held a hearing after its refusal had become effective.[4] Such conduct is an interference with freedom of the press expressly condemned in the *Walker case*, where we said:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally ob-

[4] The District Judge found that the refusal of the Post Office Department to transmit the magazines in question began on or about December 23, 1954. By letter of December 30, 1954, the Solicitor of the Post Office Department acknowledged a letter of December 29, 1954, from the Postmaster of Mays Landing, New Jersey, which set forth the action taken. The Solicitor advised that the magazines "should be withheld from dispatch," except for copies submitted for first class mailing, and that the senders "should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable . . . by offering through appearance at this [the Solicitor's] office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit."

The Postmaster of Mays Landing transmitted this information to appellant by letter of December 31, 1954. He added that the magazines in question were "nonmailable and must be withheld from dispatch." By letter of January 6, 1955, to appellant, the Solicitor acknowledged that the Postmaster's statement as to nonmailability was in error, "no ruling or determination either of mailability or non-mailability having yet been made . . . . ." He also gave notice of a hearing on the question to be held on January 10, 1955. But no action was taken to transmit the magazines in the mail. At appellant's request, the hearing was postponed to January 17, 1955. At the hearing, the Examiner ruled, correctly, we think, and without objection by the Post Office Department, that the burden of proof rested on the Post Office Department rather than appellant. An initial decision was handed down by the Examiner on January 20, 1955, and affirmed by the Solicitor on January 28, 1955. It is thus evident that appellant's magazines were barred from the mails for almost a month before the hearing and the initial decision that they were unmailable.

scene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here." 80 U.S.App.D.C. at 132, 149 F.2d at 514.

We adhere to the views we expressed in *Walker*. They apply with equal force to books magazines and newspapers, all of which are entitled to the protection of the First Amendment. And they apply with special force to a magazine like the present one, with a long record of publication and with no charge against it of obscenity of text. That additional administrative difficulties may be imposed on the Post Office Department in its efforts to prevent the mailing of magazines and newspapers alleged to contain obscene items is a matter we decline to evaluate. The authority under which the Department is operating in this field is a criminal statute passed in 1873: it contains no language which can be construed to permit the Department to refuse to transport and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it.[5] "Some day Congress may perhaps give that authorization in specific

[5] "All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished." Ex parte Jackson, 96 U.S. 727 at 736 (1877).

terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here." *Summerfield* v. *Sunshine Book Co., supra* at page 175 of 95 U.S.App.D.C. and at page 48 of 221 F.2d.

For these reasons, we conclude that the order of the Post Office Department is invalid. Under all the circumstances, having noted the passage of time and the disregard by the Post Office Department of our ruling in the *Walker* case, we think we would not be justified in permitting further administrative proceedings with respect to the magazine issues here involved. We need not, in view of this disposition, discuss the other matters raised by the parties. The case will be remanded to the District Court with instructions to issue an injunction permanently restraining the enforcement of the Department's order.

So ordered.

DANAHER, *Circuit Judge*, dissenting: While the present case reaches us in a different posture than *Summerfield* v. *Sunshine Book Co.*,[1] I shall only briefly supplement my dissent therein.[2] The publications in the former action do not differ markedly from those relied upon here as to which detailed findings were set forth by District Judge Kirkland.[3] Surely unable to dispute the trial

[1] 95 U.S. App. D.C. 169, 221 F. 2d 42 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955).

[2] *Id.*, 95 U.S. App. D.C. at 175, 221 F. 2d at 48.

[3] Sunshine Book Co. v. Summerfield, 128 F. Supp. 564 (D.C. 1955).

judge's verbal delineation of the pictorial content, the majority say he applied "improper standards" in making the determination of obscenity. I submit that a mere reading of the majority opinion against *Walker* v. *Popenoe*[4] will demonstrate the distinction between the two.

The exhibits here were obscene by any standard, in my judgment. They were so, even applying the *Walker* "standards," because (1) of the effect on the ordinary reader, (2) of the effect of the publications as a whole and (3) the "*dominant*" effect of the publications determines their character.[5] Here was no "plain but decent" publication with an obvious purpose "to educate, and so to benefit, persons who are about to marry."[6] For one who has not seen the photographs, Judge Kirkland's descriptions[7] will provide a reasonably accurate post-view, at least sufficiently so, to convey the "*dominant*" effect. Lack of reference by the Solicitor to the text of the instant publications may be pardoned since the text is so completely subordinate to the more dominant photographs. In other circumstances, cases will show, we have had no trouble deducing "intent" from what was done. No, this case is not like the *Walker* case where the order was issued "without notice or hearing,"[8] a circumstance

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[4] 80 U.S. App. D.C. 129, 149 F. 2d 511 (D.C. Cir. 1945).

[5] *Id.*, 80 U.S. App. D.C. at 130, 149 F. 2d at 512.

[6] *Id.* It is to be doubted that the publications are intended "to educate, and so to benefit, persons who are" unmarried, but that may be an "obvious" result.

[7] *Supra* note 3.

[8] *Supra* note 4, 80 U.S. App. D.C. at 131, 149 F. 2d at 513. Neither this case nor Parmelee v. United States, *supra*, strikes at the statute: surely we may assume its validity. Ex parte Jackson, 96 U.S. 727 (1878); and see, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

which we said constituted a denial of due process. Here, undoubtedly the Postmaster General sought to proceed in the light of our opinion in the former *Sunshine Book Co.* case.[9]

The chief Hearing Examiner rendered his decision after applying the test of obscenity laid down by this court in *Parmelee* v. *United States,* 72 App. D.C. 203, 113 F. 2d 729 (D.C. Cir. 1940). His findings were reasonable and, in my view, totally justified. Appellants had the benefit of the administrative remedies open to them. Then followed recourse to the District Court.

The Statute[10] in pertinent part, provides:

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character;
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> * * * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier . . . ."

That is what Congress said, and it seems to me to be plain and clear and unequivocal. My colleagues say that the views expressed in the *Walker* case "apply with equal force to books, magazines and newspapers, all of which are entitled to the protection of the First Amendment." I see no such issue here. These magazines are not being barred in advance. They may even be mailed, first class, when sealed, and after appropriate postage has

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[9] *Supra* note 1.

[10] 18 U.S.C. § 1461 (1952).

been paid. They may be transported, by trucks, by air express; and by railroad. Congress had not suppressed by statute nor has the Postmaster General here suppressed by prior action, the publication and distribution of the magazines, in violation of any First Amendment rights.[11] Congress has simply said that obscene matter is not entitled to third-class privileges, and accordingly the United States mails are not open for the distribution of these obscene publications, in part at public expense. Congress has actually assumed mounting deficits for the transportation of qualifying publications which meet Congressional standards, and has been willing that a large share of the cost of mailing them should be borne by all the people in the public interest and as a matter of public policy. But with equal clarity, in the same public interest and as a matter of public policy, it has denied such third-class privileges to those who would use the mails to disseminate obscene matter.[12] Acting pursuant to the command of Congress, the Postmaster General initiated these proceedings.

Through the Solicitor, on January 6, 1955, one of the appellants was given notice that a hearing to determine mailability or nonmailability would be held on January 10, 1955, and that "every effort will be made to insure an expeditious consideration and ruling in this matter." The other appellant on the same date was notified of a hearing to be held on January 11, 1955. Both hearings

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[11] See opinions in Brown v. Kingsley Books, Inc. et al.; — N.Y. —. (N.Y. Ct. App., April 27, 1956), 24 U.S.L. Week 2529.

[12] Cf. Hannegan v. Esquire, Inc., 327 U.S. 146, 152, 158-59 (1946).

had as their objective, a determination as to whether or not the magazines were "obscene, lewd, lascivious and indecent and, therefore, nonmailable matter, which shall not be conveyed in the mails or delivered from any post office . . . under the provisions of Title 18, United States Code, section 1461." The respective appellants were advised of their procedural rights.[13] In my judgment, the course followed coincided with the requirements of the statute, and after every procedural step had been taken, and after the District Court had fully considered the subject matter, correct conclusions were reached upon findings amply supported by the evidence.

I think it is our duty to affirm the judgment of the District Court.

[13] The Solicitor found that the publication in suit was "offered freely for sale to the general public who are not members of the nudist organization." He entered a post-publication order that the issue is obscene. There was no impermissible "prior restraint" in any event.

Appendix III

Civ. A. No. 74–55

SUNSHINE BOOK COMPANY,

Plaintiff,

—v.—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Defendant.

United States District Court
District of Columbia

Jan. 31, 1955.

O. JOHN ROGGE and JOSIAH LYMAN, Washington, D. C. *for plaintiff.*

EDWARD H. HICKEY, DONALD B. MACGUINEAS, Washington, D. C., JOSEPH LANGBART, Arlington, Va., *for defendant.*

KIRKLAND, *Judge.*

There is before the Court the case of Sunshine Book Co. v. Summerfield individually and as Postmaster General of the United States, defendant, in Civil Action No. 74–55.

The complaint was originally filed January 6, 1955, and there has been an amended complaint filed on January 18.

1955. They differ in only one slight particular. The gravamen of the complaint of January 6, 1955, was directed to injunctive relief sought by the plaintiff against the impounding of some 400 copies of the magazine Sunshine & Health for February, 1955, at the Mays Landing, New Jersey, Post Office, and, as well, a separate claim for declaratory judgment that this particular magazine was not obscene.

The amended complaint also has attached as an exhibit Sun Magazine of the issue of January-February, 1955, and seeks in a third claim a declaratory judgment that the character of that magazine is not obscene in fact.

Historically, the facts of this case indicate that on approximately December 23, 1954, the Postmaster of Mays Landing, New Jersey, Post Office, gave notice to the depositor, namely, the plaintiff here and subsidiary groups including Solar Union Naturisme, Inc., that the deposit of these magazines on instruction of the Postmaster General was being withheld from the United States mails.

At the same time notice was given of an administrative hearing before the Solicitor for the Post Office Department. The hearing began on January 16, 1955, and after several postponements has proceeded to a conclusion and there has been filed in the action of this case today the administrative finding of the Postmaster through his subordinates the trial examiner and the Solicitor for the Post Office Department, and that finding has been that the "review of the entire official record * * * upon substantial evidence * * * indicates that the magazines in question contain photographs of naked men, women and children,

principally women, clearly revealing genitals, breasts and other portions of the body normally covered in public." It concludes that, "From the advertisements therein contained, that they are offered freely for sale," and the Post Office Department through its officials in this hearing has made a finding of fact that "The photographs appear obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country."

Continuing with the historical portion of the case, there was filed at the outset with the complaint of January 6 a motion for a temporary restraining order. That was heard briefly and denied, and a date was set for the hearing of the temporary injunction, which upon hearing was likewise denied, and so it was brought up until this date, January 31, 1955, for the determination of the then pending status of the case on the final injunction.

At the time this particular Court heard the argument of the motion for a temporary injunction one of the issues raised was, and properly raised, that the administrative remedies had not been exhausted. The Court heard argument on both sides of the question and concluded that from the Congressional enactments and the customs and procedures followed that the initial determination under Title 18 U. S. C. §1461, the obscenity statute, lay with the Postmaster General, and accordingly the Court gave directions that that should first be settled and disposed of, as the record now reveals it has been, and then the matter on the nature of the finding, as well as the question raised by the pleadings, would be decided today.

Accordingly, on the record of the case, including the pleadings, the affidavits appended, affidavits appended to Civil Action 3007–53, the Court on opening statements has narrowed the issues of this particular case.

The Court has ruled that there is provision under this statute, Title 18 U. S. C. §1461, for the Postmaster General to conduct hearings and examinations into the alleged obscenity of publications, pamphlets, pictures, papers, letters, prints or other publications; that Title 18 U. S. C. §1461 is not unconstitutional; that due process under the Fifth Amendment was provided for by a hearing in which either testimony, or review of the magazines and the pictures contained therein by visual observation, and the helpful argument of counsel did constitute a proper hearing within that provision. The Court has also ruled that under Title 18, U. S. C. §1461, there is not a denial of the provisions of the First Amendment to the Constitution.

The Court also ruled preliminarily that the administrative hearing was one contemplated by the Congress and one carried out properly by its designated agent, the Postmaster General; that the scope was not essentially criminal in character, though criminal provisions are applied because the statute carefully declared that whatever was obscene, lewd, lascivious, filthy or of an indecent nature as it applied to any book, pamphlet, picture, paper, letter, print or other publication should be declared not to be mailable and should not be conveyed in the mails or delivered from any post office or by any letter carrier; that the Court was not confined to a mere determination of whether the finding of the Postmaster General from his

hearing was arbitrary and capricious but that the Court in the status of this case which antedated the actual finding in the proceedings themselves, as well as the review of the proceedings, had the right to pass upon whether there was a foundation for the Postmaster in his finding that these two publications were obscene.

That left open the sole question of whether the two publications were obscene as a matter of fact and as a matter of law.

Counsel have very ably presented the matter. They have been very careful to indicate their industry, and their deep professional learning.

Accordingly, we are in the posture of determining the standards by which to judge these particular magazines.

First of all, nudity is not, per se, obscene, as the case of Parmelee v. United States, from our own circuit, reported in 72 App. D. C. 203, 113 F. 2d 729, was clear to point out. However, we must steer a course, in the clash of these legal interests, between what is art on the one hand, pornography on the other; what is decent on the one hand as against what is indecent on the other; and what is conformity to the mores of the District of Columbia, the State of New Jersey and America in general. Accordingly, we must first consider the definitions which have been handed down in interpreting the mandate of Congress.

Title 18 U. S. Code, §1461 lays down five descriptive adjectives of what will constitute the basis of obscenity in general. Congress has used the words, "obscene",

"lewd", "lascivious", "filthy" and "indecent" and has applied them to books, pamphlets, pictures, papers, letters, prints and other publications.

This, of course, is a magazine. It is a publication. There are contained within it pictures. Accordingly, in that aspect of the statute, this Court has jurisdiction.

It is declared if they are found to be obscene they are to be non-mailable, they are not to be transported or conveyed in the mails, and they are not to be delivered from any post office or by any letter carrier.

Those parts are clear and do not need definition. But there is a need of definition as to what the Congress meant in the employment of the five adjectives.

In connection with the definition of "obscene" the Supreme Court in Dunlop v. United States, 165 U. S. 486, 17. S. Ct. 375, 41 L. Ed. 799, has declared that obscenity or the adjective "obscene" must be calculated to lower that standard which we regard as essential to civilization or calculated with the ordinary person to deprave his morals or lead to impure purposes.

In the case of United States v. One Obscene Book Entitled "Married Love," 48 F. 2d 821, from the Southern District of New York, decided in 1931, the Court there declared that obscenity means to be offensive to the senses or to the taste, refinement, disgusting, repulsive, filthy, foul, abominable, loathsome, offensive to modesty or decency, expressing or suggesting unchaste or lustful ideas; impure, indecent, lewd.

Appendix III

In our own local case, Parmelee v. U. S., 72 App. D. C. 203, 113 F. 2d 729, 730, decided in 1940, the Court said, and I quote: "Obscenity is not a technical term of the law and is not susceptible of exact definition. * * * Probably the fundamental reason why the word obscene is not susceptible of exact definition is that such intangible moral concepts as it purports to connote, vary in meaning from one period to another."

In the case of United States v. Two Obscene Books, 99 F. Supp. 760, from the District Court of California, decided in 1951, the Court indicated that the definition of "obscene" is: Offensive to chastity and modesty; that form of indecency which is calculated to promote the general corruption of morals; has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires.

Passing on to the second word which appears in the statute, namely, the word "lewd," it has been defined in United States v. Slenker, D. C., 32 F. 691, as having a tendency to excite lustful thoughts.

In the case of United States v. Males, decided in D. C., 51 F. 41, the word "lewd" has been defined as licentious.

The third word is the word "lascivious." In the case of United States v. Clarke, D. C. 38 Fed. 732, that word was defined as synonymous with "lewd"; dissolute, unchaste, calculated to excite lustful and sensual desires in those whose minds are open to such influences.

Appendix III

In the case of Swearingen v. United States, 161 U. S. 446, 16 S. Ct. 562, 40 L. Ed. 765, it was defined as: Tending to excite lust; lewd, indecent; obscene; relating to sexual impurity; tending to deprave the morals in respect to sexual relations.

The fourth word is the word "filthy." That has been defined in United States v. Davidson, D. C. 244 F. 523, as: Morally foul, polluted, nasty.

In the case of Tyomies Publishing Co. v. United States, 6 Cir., 211 F. 385, it was defined as: Dirty, vulgar, indecent, offensive to the moral sense, morally depraving, debasing.

In the case of United States v. Limehouse, 285 U. S. 424, 525 S. Ct. 412, 76 L. Ed. 843, it was defined to mean matter that, though not lewd or obscene, it nevertheless had a tendency to corrupt or debauch.

The definition of the last of these five adjectives, the word "indecent," has been stated in United States v. Davidson, D. C. 244 F. 523, to be: Offensive to common propriety; offending against modesty or delicacy; grossly vulgar, obscene, lewd.

And in the case of United States v. Smith, C. C., 11 F. 663, the word "indecent" is defined as: Immodest, impure.

Those definitions are the beacons by which the legal channel is lighted for the Court to arrive at findings of fact and conclusions of law in this case.

Next, it is clear that under the law, as the trier of the facts, the Court is to apply the test of the normal, reason-

able person, and the findings are, to be predicated upon his—that is, the normal, reasonable, prudent person's—determination.

In the case of Walker v. Popenoe, reported at 80 U. S. App. D. C. 129, 149 F. 2d 511, particularly with regard to the law on obscenity and the tests applying thereto, our Circuit Court of Appeals 149 F. 2d at page 512, stated that there should be three classifications, and laid them down by way of tests, as follows:

First, "The effect of a publication on the ordinary reader is what counts. The statute does not intend that we shall 'reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few.'"

Second, "The statute does not bar from the mails an obscene phrase or an obscene sentence. It bars an obscene 'book, pamphlet * * * or other publication * * *.' If a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute."

Third, "It would make nonsense of the statute to hold that it covers works of value and repute merely because their incidental effects may include some slight stimulation of the senses of the ordinary reader. The dominant effect of an entire publication determines its character."

As was pointed out in the case of Parmelee v. United States, 72 App. D. C. 203, 113 F. 2d 729, the modern rule was restated with emphasis, and 113 F. 2d at page 731 the Court said, and this trial court quotes:

"But more recently this standard has been repudiated, and for it has been substituted the test that a book must

be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

It has been urged upon the Court that the finding of my brother Judge Henry Schweinhaut, in the case of Summerfield v. Sunshine Book Co., No. 12,026, D. C. Cir., 221 F. 2d 42 is controlling both as to the law and the facts in this particular case, both on the doctrine of stare decisis and res judicata.

The Court rules that on the doctrine of stare decisis it is not controlling for the reason that the standards of that case by which another court could judge the findings are not set forth, and is actually complained of in the majority view of the Circuit Court of Appeals when the majority states, "In this view of the case, it does not become necessary to pass upon other questions raised by the appellees as to the constitutionality or applicability of this statute, as to the propriety of the Postmaster General's finding that the publications involved in his orders were obscene, see Parmelee v. United States, 1940, 72 App. D. C. 203, 1 3 F. 2d 729,"—and the Court with emphasis adds—"or the adequacy of the evidence and record upon which such a finding was based in the instant case."

There the Postmaster General made a very short finding unlike the finding he has made in the instant case. He merely found that some 25 copies of magazines of the same publication issued in the years 1952 and 1953 were obscene. My brother Judge Henry Schweinhaut merely stated that with that he did not agree, and he found and signed an order on a sole finding of fact that the magazines were not obscene.

It was in that posture that the case went to our Circuit Court of Appeals, and the majority very properly ruled that under Title 39, U.S.C.A. §259 (a), where a postmaster at a local station had indiscriminately withheld money orders and general mail which could touch both a lawful or unlawful purpose or legal or illegal purpose, he had exceeded his bounds, and this Court interprets the majority view as not binding upon whether subesquent issues of the same magazine might be obscene in fact.

The dissenting view of appellate case is strong that all of those magazines were obscene both in law and in fact.

There is also the case of Sunshine Book Co. v. McCaffrey, cited at Sup., 112 N. Y. S. 2d 476, where in passing upon the seizure of the same magazine from the newsstands in New York City in the year 1952, and where it was sought by injunctive powers to lift the ban which the Commissioner of Licenses of New York City had applied, that court held that the same type of magazines—Sunshine & Health and Sun magazine—were obscene, and particularly pointed to the fact that on the front page there was a picture of a nude woman which clearly showed the pubic area. That particular court repudiated the Parmelee case from our own Circuit.

This Court points to the decision in the case of Summerfield v. Sunshine Book Co., No. 12,026 as not controlling on this doctrine of stare decisis.

On the question of res judicata, for the reason that there was no clear showing what the basis was for the finding by the Postmaster that the magazines were obscene nor the

finding by the trial court that they were not obscene, the Court in this particular instance is not bound by the decision in the former case on the doctrine of res judicata. The matter is clearly before the Court for a determination.

The Court has set forth the legal beacon lights that will guide its course in the determination of whether a book, pamphlet, picture, paper, letter, print, or other publication is to be judged, and will make the following findings of fact and conclusions of law as respects the magazine Sunshine & Health, February, 1955, Vol. 23, issue No. 2, and the Sun Magazine, January-February 1955, being volume 5 and issue No. 1.

First and foremost, nudity is not obscene, per se. There are a series of silhouettes which appear in this publication of Sunshine & Health. They depict the human female form in a broad outline. The Court will hold as a fact that they are not obscene.

There are some sketches in the issue of Sun Magazine which are broad pen sketches, and while they reveal the general outline of the female form, the Court will also hold that those sketches, because of their indefiniteness, of failure to emphasize any particular part of the male or female genital area, are not obscene as a matter of fact.

The articles which appear do not contain vulgar or obscene matter, and the Court will hold that they are not obscene as a matter of fact.

The Court will also hold that the American people are a clothed race, that under our Constitution the views of

thers are always permitted, and that progress comes out f some of those views and aids, generally, all the citizens.

The Court will hold that nudism in its present stage is cult or a society or a group that represents a very small inority of the American people.

The Court will also hold that, from acceptance of the najority in works of art, in medical and scientific journals, ooks, magazines and literature, religious articles and the ike, pictures which show the human form merely in the ude and beyond that not revealing the pubic area or the nale or female genitalia, are not obscene.

The Court will also hold as a fact that posterior views of nudes, be they male or female, young or old, whether photographed or sketched at short or long distances, are not obscene as a matter of fact. Views taken from the side of nude persons, male or female, young or old, that do not reveal the genitalia or the pubic area, are not obscene. Where the one photographed or sketched, or whose likeness is reproduced on parchment or paper, or canvas, makes concealment of the pubic area by his or her limbs or by objects, or where the area is concealed by shadow, such pictures are not obscene as a matter of fact. Pictures taken at sufficient distance, although being a front view, are not obscene. It depends upon the distance of the camera's focus or the projection of the artist or the one who is sketching the scene—the distance as projected from the viewer's eye.

Where the artist or the photographer obscures by shadowing, by retouching photographic plates, or by conceal-

ment or obliteration of the pubic area, though it reveals all other formations of the nude body, male or female, young or old, that is not obscene as a matter of fact.

Where children are photographed in a frontal view which reveals the diminutive and undeveloped genitalia, that is not obscene as a matter of fact.

It is difficult to lay down a hard and fast rule but certainly, drawing upon the criminal rule as an analogy, children below the age of seven photographed in such condition do not exhibit a picture which is obscene, lewd, lascivious, filthy, or of an indecent nature, by virtue of their age of innocence, the under-development of their genitalia, and the common acceptance of the American people of such views.

Between the ages of seven and fourteen, when the children undergo rapid development, and especially in the warmer portion of our country, there, of course, because of the development which occurs in the pubic area, which is a small portion of the human anatomy characterized by pubic hair in both sexes, and where genitalia are also intimately revealed, it may or may not, depending upon the distance, the obliteration, the shadowing and the like, be obscene as a matter of fact.

Where photographs are taken of the pubic area at very close range they are as a matter of fact obscene, and, it will follow, as a consequence, as a matter of law, obscene.

As to the female breast there is always the problem of the acceptance of its exposure by the majority of the American people. The organ, of course, is one of nutrition

for young, expanding during periods of pregnancy and reducing in size when the state of non-pregnancy and the nurture of the young child has no longer required its function.

The public is, therefore, accustomed to the view of the nursing mother and has not found it to be indecent or obscene. Since the ancient past there have been many periods of years when, as to the form of dress worn by the female, the plunging neckline has been accepted in the mores of the people, so that the revealing of the breast would not in itself be obscene. However, its accentuation, its distortion, or its grossness could, under the broad definition, depending upon the situation, make it filthy or might make it indecent.

Of course, the Court is not touching upon the question which would appear to be the fact, that sometimes partial concealment adds to allure, because the pictures involved in these cases, where they run against the standards the Court has indicated, are not pictures where there is concealment.

Accordingly, against those broad findings of fact the Court will make these particular findings of fact.

On the outside cover of Sunshine & Health Magazine for February, 1955, there is a close view of a young woman apparently in her early twenties. There is no show of the pubic area and there is no show of the genitalia by the angle at which the picture is shot. While the shadowing on her chest is grotesque and indicates a bosom larger by far than normal, it is shot at such an angle as to elongate and

make quite massive the breast as distinguished from the very small nipple. While it gives an effect, in general, of grotesqueness by the tests which the courts have laid down, it is not obscene under the test of this statute.

There is a picture of a young girl on page 7. She appears to be approximately six or seven. It is a frontal view taken within a very short range of approximately 6 feet. She is swinging on a swing, facing the camera. While the labia majora are shown, they are diminutive and juvenile. One would have to be prudish to hold that that was an obscene picture. The Court does not hold it as a fact and rules that it is a picture that does not contravene this statute.

On page 9 there is a picture of a man on water skiis, taken at some distance. His genitalia are clearly revealed, appearing in the center of the picture. The Court is going to hold that by the closeness, the detail that can be seen, that that is an obscene picture within the purview of the statute.

There is a picture shown at the upper portion of page 13. This is a picture of two persons, a woman seated beside a pool and a man standing to her side. The woman, by the crossing of one leg partly over the other, has obsecured the pubic area and genitalia, and hers is not an obscene picture. The man, on the other hand, is standing with a side view. By artful use of shadow his face is completely obliterated, his entire pubic area is obliterated by the shadow, but prominently shown in front of the pubic area and against this dark background is his male organ; the corona of the penis is clearly discernible; in fact, even

a casual observation of it indicates that the man is circumsized. This obviously has no place even in illustrating the principles of nudism. It is filthy, it is foul, it is obscene, and the Court will hold such as a matter of fact.

On page 15 there are four middle-aged women with their backs to a very large oak tree, appearing to be some 12 feet in diameter. They are holding hands and facing the camera. Only two of these women are revealed to the viewer. The woman to the left is a woman of middle age. She has very large thighs. The pubic hair is clearly shown. Her right thigh is particularly noticeable because, though there are trees nearby, the formation which appears on the thigh is not that of shadow, it appears to be matted varicose veins that cause her to be grotesque, vile, hold her up as an object of scorn, and the Court will hold under the statute that that is filthy, and that it is indecent. That is also true of the woman in the foreground who, while not in as much sunlight as the other, nevertheless clearly reveals her pubic area as she stands within approximately 6 feet of the camera.

On page 16, in a mixed group, there is one man revealed at the corner where his genitals are clearly shown, and the Court will rule as a matter of fact that that is obscene.

On page 29 there is a most unusual picture. Here are two women who appear to be in their late twenties or early thirties. The woman to the left appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.

I assume the illustration, not retouched by the photographer, is to represent the normal, natural person and

reveals her as she was in fact when the picture was taken This picture was taken within approximately 12 feet of the camera. First of all, so far as the demonstration of nudism goes, the picture shows a very clear sunburned "V" at her neck—V-shaped sunburn—whereas the rest of her skin is white as the snow on which she stands. The Court might gather she is a new member or a non-conformist. She has large, elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the pubic area shown.

Being most liberal, one might say that the area shown of the pubic hair is caused by shadow, but the same is not to be noticed on both sides. The hair extends outwardly virtually to the hipbone. It looks to the Court like a retouched picture because the hair line instead of being straight is actually scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy, the representation is dirty, and the Court will hold that that picture is obscene in the sense that it is indecent, it is filthy, and it is obscene as a matter of fact; because of the closeness of the view the woman to her left and the viewer's right is likewise held to be obscene.

The intent of the photographer and publisher is clearly shown by those prior pictures, because on page 17, standing within 8 feet of the photographer, is a male figure. Although the outline of his body is shown, the pubic area and genitalia are completely blocked out, revealing a picture under one condition there, and showing pictures under

different conditions, as pointed out by the Court, and the Court points to that fact and holds that the latter pictures were thus reproduced intentionally.

With regard to Sun Magazine against the standards set forth, the Court will hold that the picture of the young girl photographed on page 6, standing within approximately 6 feet of the camera, showing the pubic area, is obscene; that it is lewd, lascivious, and tends to incite lust and sensual ideas; that the two pictures shown on pages 8 and 9 of a young girl in her early twenties standing within short range of the camera, approximately some 8 to 10 feet, in a frontal view showing the clear detail of the pubic area, are obscene.

On page 11 there is a picture of three females with the caption, "Mrs. Nudism of 1954 and Two of Her Ten Children." The two girls who appear with her are in their early teens. The mother is obese, short, stocky, has large flat breasts; the pubic area is somewhat shaded by shadow; the pubic hair is matted; the over-all picture is one of vulgarity, filth, obscenity and dirt. But the photographer in taking this picture has caused the two girls to turn to a side view and the sunshine clearly shows the fine, soft texture of pubic hair of the adolescent girls, and accordingly the Court finds the picture is obscene, lewd, and lascivious.

There is shown on page 13 a picture of a woman in her early twenties. She is standing in a three-quarter pose within 6 feet of the camera. There is a woman to the side holding a large inflated ball of some sort. The sun and the said ball have cast a shadow upon the body of the other woman. While it is suggestive, it, nevertheless, by the

distance, the posture and the elimination through the shadow of the pubic area, is not obscene.

There is a sketch on page 19 of Sun Magazine which does not show in any great detail the pubic area of the two females shown tossing a large ball, and the Court finds that the drawing is not obscene.

There are pictures taken within an approximate range of 15 feet of the camera, in the surf, showing two nude couples. The women are obscured by the waves. The man in the foreground has completely revealed his male genitalia, and the Court will hold that that is obscene.

There is a suggestive picture on page 23—what appears to be a Mexican, a woman of Mexican birth, a very dark complexioned woman. But the shadows in the scene obliterate the pubic area, and the Court will hold that that is not obscene as a matter of fact or law.

There is a picture taken of a group at some great distance watching an exhibition of judo or wrestling, on page 29, but by virtue of the distance at which that picture is taken the Court will hold that it is not an obscene, lewd or lascivious picture.

Accordingly, the Court concludes as a matter of fact that the pictures fall within the standards as the Court has indicated in its findings, and concludes as a matter of law that the right of the Postmaster to have made his initial findings as he did is established by the cases. The statute does not thwart the principles of the First Amendment or the Fifth Amendment; that there was foundation in fact for his findings, and review of the entire official

record and of the initial decision by the Post Office Examiner, and discloses no erroneous findings of fact nor conclusions of law; the initial decision was founded upon substantial evidence and contains correct rulings, findings of fact and conclusions of law upon all material issues. These magazines contain photographs of naked men, women and children—principally women—clearly revealing genitals, breasts and other portions of the body normally covered in public. It is apparent from advertisements therein contained that they are offered freely for sale to the general public who are not members of the nudist organization. The photographs appear to be obscene and indecent when judged by the ordinary community standards of the vast majority of the citizens of our country.

The postmaster at Mays Landing, New Jersey, will, accordingly, be instructed to treat the February 1955 issue of Sunshine & Health and the January-February issue of Sun (Solaire Universelle Nudisme) as non-mailable.

The Court finds from the record, from the standards, that there was basis in fact and in law for the conclusion of the Postmaster General, and accordingly will sustain him in that view. The Court will conclude as a matter of law that since the dominant theme of both magazines, by the findings of fact, is clearly one of obscenity, the Court will direct first that the motion for a permanent injunction as against the action of the Postmaster General in withholding 400 copies of Sunshine & Health, February, 1955, will be dismissed with prejudice, and disposition of those copies, depending upon an ultimate determination, will

proceed in accordance with postal regulations. On the amended complaint in the third claim seeking a declaratory judgment on Sun Magazine, January-February 1955 issue, the Court will enter judgment for the defendant in the cause and will find as a fact that the magazine is obscene within Title 18 U.S.C. Code 1461.

Counsel will prepare suitable findings of fact and conclusions of law.